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796
No. 2230

United States
Circuit Court of Appeals
For the Ninth Circuit.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
a Corporation,

Appellant,

vs.

BENNETT & GOODALL, a Corporation, NAPA GRAVEL & MATERIAL COMPANY, a Corporation, and
AMERICAN BONDING COMPANY OF BALTIMORE, a Corporation,

Appellees,

and

BENNETT & GOODALL, a Corporation,

Cross-appellant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
a Corporation, and NAPA GRAVEL & MATERIAL COMPANY, a Corporation, and AMERICAN
BONDING COMPANY OF BALTIMORE, a Corporation,


Cross-appellees.

APOSTLES.

Upon Appeal and Cross-appeal from the United States District
Court for the Northern District of California,
First Division.

FILED

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Records of U.S. Circuit
Court of appeals

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First Division.

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*In the District Court of the United States for the
Northern District of California.*

No. 13,686.

AMERICAN-HAWAIIAN STEAMSHIP COM-
PANY (a Corporation),

Libelant,

vs.

BENNETT and GOODALL (a Corporation),
Respondent.

Statement of Clerk U. S. District Court.

PARTIES.

LIBELANTS: American-Hawaiian Steamship Com-
pany (a Corporation).

RESPONDENTS: (Original) Bennett and Good-
all (a Corporation).

(Brought into case) Napa Gravel and Material
Company (a Corporation) and
American Bonding Company of Baltimore (a
Corporation).

[A*]

PROCTORS.

LIBELANTS: Messrs. Andros and Hengstler, San
Francisco, California.

RESPONDENTS: (Bennett and Goodall) (Orig-
inal Proctors) Edwin T. Cooper, Esquire, and
Sheldon G. Kellogg, Esquire, both of San Fran-
cisco, California.

*Page-initial appearing at foot of page of original certified Record.

2 *American-Hawaiian Steamship Company*

(Associated Counsel) William Denman, Esquire, and G. S. Arnold, Esquire, of the firm of Denman and Arnold, of San Francisco, California.

(Napa Gravel and Material Company) Theodore A. Bell, Esquire, of San Francisco, California.

(American Bonding Company of Baltimore) Albert Raymond, Esquire, of San Francisco, California (Original Proctor); Jesse W. Lilienthal, Esquire, of San Francisco, California (Associated Counsel).

1907.

August 21. Filed verified Libel.

Issued Citation for the appearance of Bennett and Goodall, a corporation. Said Citation was afterwards returned and filed on August 27th, 1907, with the following return of the United States Marshal for the Northern District of California, indorsed thereon, to wit: [B]

“I hereby certify and return that I served the annexed Citation on the therein named Bennett & Goodall, a corporation, by handing to and leaving a true and correct copy thereof with J. H. Bennett, its Vice-president, personally at San Francisco, in said Dis-

trict on the 26 day of August A.
D. 1907.

CHARLES T. ELLIOTT,

U. S. Marshal.

By James L. Nolan,

Office Deputy."

September 14. Filed Answer and Exceptions to
Libel (Bennett and Goodall).

October 19. Filed Exceptions to Answer of Ben-
nett and Goodall.

1908.

October 30. A hearing was this day had before
the Honorable John J. De Haven,
Judge of the District Court of the
United States for the Northern
District of California, as to the
issues raised by Exceptions to An-
swer of Bennett and Goodall.

1909.

March 30. Filed Memorandum Opinion Order-
ing Exceptions Sustained.

April 14. Filed Petition to bring in new par-
ties.

April 14. Filed Order that process issue
against Napa Gravel and Material
Company and against American
Bonding Company of Baltimore.
Issued Citation for appearance of
said Napa Gravel and Material
Company and American Bonding
Company of Baltimore. Said
Citation was afterwards, on the

15th day of April, returned and filed with the following return of the United States Marshal for the Northern District of California, indorsed [C] thereon, to wit:

“I hereby certify that I received the within Citation on the 16th day of April, 1909, and personally served the same on the Napa Gravel and Material Company, a corporation, by handing to and leaving a copy hereof with Theodore A. Bell, personally, the Secretary of the said Napa Gravel and Material Company, a corporation, on the 16th day of April, 1909, in the City and County of San Francisco, in said District, and on the American Bonding Company of Baltimore, a corporation by handing to and leaving a copy hereof with Joy Lichtenstein, personally, the agent and attorney in fact of said American Bonding Company of Baltimore, a corporation, on the 16th day of April, 1909, in the City and County of San Francisco, in said District.

Dated at San Francisco, California,
this 16th day of April, 1909.

C. T. ELLIOTT,

United States Marshal.

By B. F. Towle,

Office Deputy Marshal."

- | | | |
|-----------|-----|---|
| April | 27. | Filed libelant's acknowledgment of service of Petition to bring in new parties and waiver of Citation.
Filed Napa Gravel and Material Company's Exceptions to Libel and Petition. |
| May | 18. | Filed American Bonding Company's Exceptions to Libel and Petition. [D] |
| August | 17. | A hearing was this day had before the Honorable John J. De Haven, Judge of the District Court of the United States for the Northern District of California, on the Exceptions to the Libel, and which were this day argued and submitted. |
| September | 2. | Order Exceptions of American Bonding Company and Napa Gravel and Material Company, be overruled, etc. |
| October | 11. | Filed Answer of American Bonding Company. |
| November | 15. | Filed Answer of Napa Gravel and Material Company. |

1910.

- April 1. Filed Deposition of John P. Lattimore.

1912.

- January 11. This case this day came on for hearing before the Honorable R. S. Bean, sitting as Judge of the District Court of the United States for the Northern District of California, and a hearing duly had and continued to several days until on January 15th, 1912, when the case was finally argued and submitted.
- January 23. Filed Transcript of Testimony taken in open court.
- February 3. Oral Opinion rendered dismissing Libel.
- February 5. Filed Opinion—dismissing Libel.
- February 5. On motion, the Petition impleading the Napa Gravel and Material Company, was dismissed.
- April 8. Filed Decree, dismissing Libel.
- April 25. Filed Memorandum Opinion on Taxing of Costs.
- August 28. Filed Notice of Appeal on behalf of American-Hawaiian Steamship Company.
- September 14. Filed Assignment of Errors of American-Hawaiian [E] Steamship Company.
- September 16. Filed Notice of Cross Appeal—Bennett and Goodall.

October 3. Filed Assignment of Errors of
Bennett and Goodall. [F]

*In the District Court of the United States, Northern
District of California.*

No. 13,686.

AMERICAN-HAWAIIAN STEAMSHIP CO., a
Corporation,

Libelant,

vs.

BENNETT & GOODALL, a Corporation,

Respondent.

Praecipe [for Apostles on Appeal].

To the Clerk of Said Court:

Libelant herein having appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of this Court entered herein, you are hereby requested to prepare and certify the Apostles on Appeal, to be filed in said Appellate Court within thirty days after the giving of notice of this appeal, as in Rule 5 of the "Rules in Admiralty" of said Appellate Court provided; said Apostles on Appeal to be prepared in accordance with Rule 4 of said "Rules in Admiralty," except that all the exhibits introduced in evidence shall be filed in the Appellate Court in their original form.

September 14, 1912.

ANDROS & HENGSTLER,
Proctors for Libelant and Appellant.

[Endorsed]: Filed Sep. 14, 1912. Jas. P. Brown,
Clerk. By Francis Krull, Deputy Clerk. [1*]

*Page-number appearing at foot of page of original certified Record.

[Praeipe for Apostles on Cross-appeal.]

*In the District Court of the United States, in and
for the Northern District of California.*

FIRST DIVISION—IN ADMIRALTY.

AMERICAN-HAWAIIAN STEAMSHIP CO., a
Corporation,

Libelant,

vs.

BENNETT & GOODALL, a Corporation, NAPA
GRAVEL AND MATERIAL COMPANY,
a Corporation, and AMERICAN BONDING
COMPANY OF BALTIMORE, a Corpora-
tion,

Respondents.

PRAECIPE OF BENNETT & GOODALL,
CROSS-LIBELANT.

To the Clerk of the Above-entitled Court:

You will please take notice that the Apostles on Appeal requested to be prepared in the praecipe of the proctors for libelant will constitute in part the Apostles on Appeal of respondent Bennett & Goodall, to which you are directed to add the following papers, pleadings and orders in said suit:

The Notice of Cross-appeal of Respondent Bennett & Goodall.

The Assignments of Error of Respondent Bennett & Goodall.

The Order making Napa Gravel & Material Company and American Bonding Company of Baltimore Respondents.

The Petition for the above order.

The Exceptions to the Petition filed by Napa Gravel & Material Company.

The Exceptions to the Petition filed by American Bonding Company of Baltimore.

Any other pleadings or orders involving the rights or [2] liabilities of any of the Respondents.

EDWIN T. COOPER,

G. S. ARNOLD,

WILLIAM DENMAN,

DENMAN & ARNOLD,

Proctors for Bennett & Goodall.

[Endorsed]: Filed Oct. 3, 1912. Jas. P. Brown, Clerk. By C. W. Calbreath, Deputy Clerk. [3]

*In the District Court of the United States, in and
for the Northern District of California.*

AMERICAN-HAWAIIAN STEAMSHIP CO., a
Corporation,

Libellant,

vs.

BENNETT & GOODALL, a Corporation,

Respondent.

Libel.

To the Honorable JOHN J. DE HAVEN, Judge of
the District Court of the United States in and
for the Northern District of California.

The libel of the American-Hawaiian Steamship Co., a corporation, against Bennett & Goodall, a corporation, in a cause of contract, civil and maritime, alleges as follows:

I.

That the American-Hawaiian Steamship Co., libelant herein, at all the times hereinafter mentioned was and still is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and having an office in the city of San Francisco, in said Northern District of California.

II.

That Bennett & Goodall, respondent herein, at all the times hereinafter mentioned, was and still is, as plaintiff is informed and believes, a corporation organized and existing under the laws of the State of California, having its principal place of business in said City and County of San Francisco.

III.

That on or about the 18th day of March, A. D. 1907, [4] libelant was the owner of the lighter called "Number One"; that on or about said 18th day of March, A. D. 1907, libelant and respondent made an agreement in writing, by the terms of which libelant chartered and hired said lighter "Number One" to respondent, for a monthly rental then and there agreed upon. That, among other things, it was then and there agreed between libelant and respondent that respondent should be responsible to libelant for said lighter, and in particular for the loss thereof, and should return said lighter to libelant in as good order and condition as when received, and that, in case respondent should lose or fail to return the said lighter, the agreed value thereof, to be paid by respondent to libelant, should be the sum of Seven Thousand Five Hundred Dollars (\$7,500).

IV.

That thereafter respondent took possession of said lighter under said agreement of charter and hire, and that while said lighter was thus in the possession and under the exclusive control of respondent, the same, as plaintiff is informed and believes, in a manner not known to plaintiff, became a total loss.

V.

That respondent has made it impossible to return, and has not returned said lighter to libelant, according to its said promise, in as good order and condition as received, but, though requested to return the same or to pay its agreed value of Seven Thousand Five Hundred Dollars (\$7,500.00), has neglected and refused, and still neglects and refuses so to do.

VI.

That plaintiff has been damaged by the premises in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00), and [5] interest thereon from the date of the loss of said lighter.

VII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE libelant prays that a citation, according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue to said respondent, Bennett & Goodall, a corporation, citing and admonishing it to appear and answer all and singular the matters aforesaid, and that the Court may pronounce for damages in favor of libelant in the sum of Seven Thousand Five

Hundred Dollars (\$7,500.00) as aforesaid, with interest and costs, and may give to libelant such other and further relief as in law and justice it may be entitled to receive.

ANDROS & HENGSTLER,
Proctors for Libelant. [6]

City and County of San Francisco,
Northern District of California,—ss.

Henry W. Poett, being duly sworn, deposes and says: That the libelant in the above-entitled cause is a foreign corporation, to wit, a corporation organized and existing under the laws of the State of New Jersey, that none of the officers of said corporation reside within said Northern District of California nor within one hundred miles of the City and County of San Francisco, in said District; and that affiant is authorized by said corporation to sign and verify this libel. That he has read the foregoing libel and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief; and as to those matters, that he believes it to be true.

HENRY W. POETT.

Subscribed and sworn to before me this 21st day of August, 1907.

[Seal]

JOHN FOUGA,

Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Aug. 21, 1907. Jas. P. Brown,
Clerk. By John Fougá, Deputy Clerk. [7]

*In the District Court of the United States, in and for
the Northern District of California.*

AMERICAN-HAWAIIAN STEAMSHIP CO., a
Corporation,

Libelant,

vs.

BENNETT & GOODALL, a Corporation,

Respondent.

**Answer and Exception of Bennett and Goodall to
Libel.**

To the Honorable JOHN J. DE HAVEN, Judge of
the District Court of the United States in and
for the Northern District of California:

The Answer and Exception of Bennett & Goodall,
a corporation, respondent, to the Libel of said libel-
ant filed herein, in a cause of action, civil and mari-
time, alleges:

1.

That said respondent has no knowledge whether
said libelant is a corporation or not.

2.

That said respondent is and at all the times herein
mentioned was a corporation as alleged in said libel.

3.

Said respondent denies that it was then and there,
or then or there, or at any time or place, ever agreed
between libelant and respondent that respondent
should be responsible to libelant for said lighter or
in particular for the loss thereof or should return
said lighter to libelant in as good condition or order

as when received, and denies that it was agreed that in case respondent should lose or fail to return said lighter the agreed value thereof to be paid by respondent to libelant should be \$7,500 or any other sum; and in this behalf said respondent alleges the facts to be as follows: That on or about March 18, 1907, at San [8] Francisco, California, libelant and respondent entered into a certain written Agreement with respect to said lighter, a copy of which said Agreement is hereto annexed, marked Exhibit "A" and expressly made a part hereof; that said Agreement is the only one existing or entered into between libelant and respondent respecting said lighter.

4.

Said respondent denies that it took possession of said lighter under the Agreement set forth in said Libel, or under any Agreement other than is hereto attached and marked Exhibit "A," and denies that while said lighter was in the possession of or under the exclusive control of respondent, the said lighter was and became a total loss; and in this behalf said respondent alleges the facts to be as follows: that it took possession of said lighter under the Agreement attached hereto and marked Exhibit "A"; and thereafter rechartered the said lighter with the knowledge of said libelant, and the said lighter was not at the time of its alleged loss in the possession or under the control, exclusive or otherwise of said respondent, but was out of its possession and control absolutely.

5.

Said respondent denies that it has made it impos-

sible to return or has not returned said lighter, according to its promise, but, on the contrary, alleges that it has fully and faithfully lived up to and performed said Agreement attached hereto and marked Exhibit "A" in all respects as agreed; and said respondent in this behalf alleges the facts to be as follows: That the said lighter, as libelant is informed and believes and therefore alleges, was at all times and is now fully insured to its full value in favor of and by said libelant, as agreed in its said Agreement [9] attached hereto; that said lighter was lost and that the loss is fully covered and insured by the insurance policy or policies issued and existing thereon in favor of said libelant, and that said libelant is fully indemnified and will be fully compensated by the insurer for the loss of said lighter, and said libelant has not sustained and will not sustain any damage of any kind or in any sum whatever in the premises, and said respondent denies that libelant has been damaged in the sum of \$7,500 or in any sum or in any interest whatsoever.

6.

Said respondent denies that all or singular the premises set forth in said libel are true, other than as herein stated, or are within the admiralty or maritime jurisdiction of the United States or this Honorable Court.

II.

And as a further answer and defense and exception to said Libel said respondent alleges.

7.

That libelant and respondent entered into the

written Agreement with respect to said lighter hereto attached, marked Exhibit "A" and made a part hereof, and respondent took possession of said lighter thereunder; and thereafter and before the alleged loss thereof, rechartered and delivered the same to the Napa Gravel & Material Company, a corporation, said last-named corporation being in the actual possession and exclusive control thereof at the date of its loss; that, as respondent is informed and believes and therefore alleges, said loss of said lighter was and is fully covered and insured in favor of said libelant by insurance issued, and maintained by libelant on said lighter as agreed in said Exhibit "A," all of which said insurance can be collected by [10] libelant in a proper action for that purpose; that said respondent is informed and believes, and therefore alleges, that said libelant has made no attempt to collect the said insurance payable on said loss, and has not brought nor instituted any action to collect or recover on said policy or policies insuring said lighter, nor has said insurer ever made or had the opportunity of making or sought to make any successful or other defense to the payment of the face value of said policy or policies; and said respondent alleges that it is necessary and an absolute condition precedent to the institution and maintenance of this action and libel that said libelant should first seek and endeavor to collect by appropriate action in a court of competent jurisdiction the said insurance policy or policies and to recompense itself fully for the loss of said lighter, and that this said action and libel is there-

fore premature, and said respondent excepts thereto on this ground and asks the dismissal thereof.

III.

8.

And for a further answer, defense and exception to said libel said respondent alleges: That said libel does not truly or accurately set forth the contract entered into between libelant and respondent, and varies therefrom in many material and important provisions and conditions, as more fully and clearly appears from the said alleged contract as set forth by libelant and as specifically made a part hereof and contained *in haec verba* in Exhibit "A" hereto attached, and on this ground said respondent asks that said libel be dismissed.

IV.

9.

And for a further answer, defense and exception to said [11] libel, said respondent alleges that all the transactions referred to in said libel and herein occurred within the State of California, and that this Honorable Court has no jurisdiction thereof.

10.

That all and singular the aforesaid premises are true.

WHEREFORE, said respondent prays that this Honorable Court would be pleased to pronounce against the said libel aforesaid, and to dismiss the same, and condemn the libelant in costs, and otherwise law and justice to administer in the premises.

EDWIN T. COOPER and
SHELDON G. KELLOGG,
Proctors for Respondent.

State of California,
City and County of San Francisco,—ss.

Edwin T. Cooper, being first duly sworn, deposes and says: That he is an officer, to wit, the Secretary of Bennett & Goodall, a corporation, the respondent named in the foregoing Answer and action; that he is authorized to and makes this affidavit on behalf of said respondent; that he has read the foregoing Answer and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters that he believes it to be true.

EDWIN T. COOPER.

Subscribed and sworn to before me, this 14th day of September, 1907.

[Seal] ADELINE COPELAND, [12]
Notary Public in and for the City and County of
San Francisco, State of California. [13]

EXHIBIT "A."

(On Letter-head of Libelant). "CWC-J."

"San Francisco, March 18th, 1907.

Messrs. Bennett & Goodall,
8 Mission Street,
San Francisco.

Dear Sirs:

Confirming conversation we had with you last Saturday, we hereby agree to rent you our lighters upon the following terms:—

Rent to be \$450.00 per month for each lighter.

You have taken Lighter No. 2 at 7 A. M. March

12th, 1907, and rental of that lighter starts at that time.

In case we need these lighters, we are to rent them from you at \$15.00 per day each, dating from the time they are delivered to us until you are notified that they are again at your disposal. We are to give you at least one week's notice, when we require them, or either of them, and if you cannot send them on a contemplated trip and get them back before the week is up, we will take them any time within that week, and if we have any call for them for a short time job, we will refer the inquiry to you, and you can hire them out to the parties so inquiring, providing that you bind yourself to return the lighter to us on the original notification date; you to agree to pay all losses incurred by us by reason of your failure to have the lighter at our disposal, after you have been given a week's notice.

You are to be responsible for these lighters and whatever gear is on them when you take them, and are to return them in as good order and condition as when you get them, reasonable wear and tear and happenings covered by their present policies of insurance excepted. [14]

You are particularly not to permit anything to be loaded on them or unloaded from them, in a manner that will twist or strain them, and if they are lost through any cause that will permit our underwriters to make a successful defense against paying the face of the policies, you are to be responsible.

We are to keep the lighters insured, as they are now insured, and we are to pay the wharfage on

20 *American-Hawaiian Steamship Company*

them, while they are in our possession. You are to pay the wharfage at all other times.

We agree to keep them in repair, but this does not release you from any obligation hereinbefore mentioned.

This agreement is subject to termination by either party on thirty (30) days' notice.

If this is not in accordance with your understanding, please advise

Yours faithfully,

C. W. COOK,

Pacific Coast Manager."

(On Letter-head of Respondent.)

"San Francisco, Cal., March 23, 1907.

Mr. C. W. Cook,

Pac. Coast Manager, A. H. S. S. Co.,
City.

Dear Sir:

Replying to yours of the 18th inst. relative to chartering to us of the American Hawaiian Steamship Company's barges #1 and #2. The terms of said charter as set forth in your communication referred to above, are entirely satisfactory to us and are hereby accepted.

In accordance with our conversation, the agreed value of the barges, is Seventy-five hundred Dollars (\$7,500.00) [15] each.

Yours truly,

BENNETT & GOODALL.

Due service of within Answer, etc., admitted and copy received Sept. 14, 1907.

ANDROS & HENGSTLER,

Proctors for Libellant.

[Endorsed]: Filed Sept. 14, 1907. Jas. P. Brown,
Clerk. By J. S. Manley, Deputy Clerk. [16]

*In the District Court of the United States, in and for
the Northern District of California.*

AMERICAN-HAWAIIAN STEAMSHIP CO., a
Corporation,

Libelant,

vs.

BENNETT & GOODALL, a Corporation,

Respondent.

**Exceptions of American-Hawaiian Steamship
Company to Answer.**

The exceptions of American-Hawaiian Steamship Co., libelant, to the answer of Bennett & Goodall, respondent allege:

First. Libelant admits that Exhibit "A," annexed to the answer on file herein, contains a full, correct and true copy of the entire contract between respondent and libelant referred to in Article III of the libel on file herein.

Second. Libelant alleges that the alleged answer, defense and exceptions, contained in Article II of respondent's Answer is insufficient and irrelevant in this, to wit:

1. That it does not state facts sufficient to constitute a defense to said libel.

2. That all the allegations of said Article II contained on page 4 of said answer, from line 1 to 16, are founded upon an erroneous conclusion of law

and therefore incompetent, immaterial and irrelevant.

3. That the allegations of said Article II contained on page 4 of said answer, from line 8 to line 16, are conclusions of law.

4. That the allegations of said Article II contained on page 4 of said answer, from line 8 to [17] to line 16, are erroneous conclusions of law.

Third. Libelant alleges that the alleged answer, defense and exception, contained in Article III thereof, is insufficient and irrelevant in this, to wit:

1. That the entire contract between respondent and libelant appears from the pleadings on file herein Exhibit "A" to the answer annexed being admitted by libelant to contain a full and true copy of the said entire contract.

2. That the libel on file herein truly alleges the contract between respondent and libelant, with the exception of defensive matter properly pleaded by respondent, and that said defensive matter appears in the answer on file herein.

3. That all the issues and differences between the parties, growing out of the transaction in the libel stated, are determinable by the Court in the pleadings on file herein.

WHEREFORE libelant prays that the irrelevant matter in said answer contained, to wit, all that part thereof following after the word "purpose," on line 30 on page 3, and including the word "dismissed" on line 25 on page 4 of said answer, be stricken out.

ANDROS & HENGSTLER,

Proctors for Libelant.

Service of the within Exceptions to Answer is hereby admitted this 16th day of October, 1908.

EDWIN T. COOPER and
SHELDON G. KELLOGG,
Proctors for Respondent.

[Endorsed]: Filed Oct. 19, 1908. Jas. P. Brown,
Clerk. By John Fougá, Deputy Clerk. [18]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 30th day of October, in the year of our Lord, one thousand nine hundred and eight. Present: JOHN J. DE HAVEN, Judge.

No. 13,686.

AMERICAN-HAWAIIAN S. S. CO.

vs.

BENNETT and GOODALL.

Order Submitting Exceptions to Answer.

The hearing of the exceptions to the answer in the above-entitled case this day came on for hearing, Mr. E. T. Cooper, and Sheldon G. Kellogg appearing as proctors for defendant, and Mr. L. T. Hengstler, appearing as proctor for libelant, and after argument by the respective proctors, by the Court ordered that said exceptions be, and they are hereby submitted to the Court for decision. [19]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 30th day of March in the year of our Lord, one thousand nine hundred and nine. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 13,686.

AMERICAN-HAWAIIAN STEAMSHIP COM-
PANY

vs.

BENNETT & GOODALL, a Corporation.

Order Sustaining Exceptions to Answer.

The exceptions to the answer herein having been heretofore submitted to the Court for decision, now after due consideration had thereon, the Court files its written memorandum opinion, and by the Court ordered that said objections be, and the same are hereby sustained. [20]

[Memorandum Opinion on Exceptions to Answer.]

*In the District Court of the United States, for the
Northern District of California.*

No. 13,686.

AMERICAN-HAWAIIAN STEAMSHIP CO.,
a Corporation,

Libelant,

vs.

BENNETT & GOODALL, a Corporation,
Respondent.

DE HAVEN, District Judge.

The exceptions to the answer will be sustained. The obligation which the respondent assumed, under the contract set out in the answer, was to return the lighter, therein mentioned, to the libelant "in as good order and condition" as when received from libelant, "reasonable wear and tear and happenings covered by their present policy of insurance excepted." The burden is upon the respondent to show that said lighter was lost by some peril covered by the policy of insurance, referred to in the contract, and the libelant is not required, as a condition precedent to the right to maintain this action to first seek to recover the value of such lighter from the insurance company, in which it was insured.

Exceptions sustained.

[Endorsed]: Filed Mar. 30, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. [21]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 13,686.

AMERICAN-HAWAIIAN STEAMSHIP COM-
PANY, a Corporation,

Libelant,

vs.

BENNETT & GOODALL, a Corporation,

Respondent.

Petition of Respondent for Order Bringing in New Parties.

To the Honorable JOHN J. DE HAVEN, Judge of the District Court of the United States in and for the Northern District of California:

The petition of respondent, Bennett and Goodall, a corporation, respectfully alleges:

1.

That both libelant and respondent, and also the Napa Gravel & Material Company, and American Bonding Company of Baltimore, are and each of the aforementioned parties is a corporation.

2.

That said Napa Gravel and Material Company has its principal place of business within the said Northern District of California, and said American Bonding Company of Baltimore has a general agent, to wit, one Joy Lichtenstein, resident in San Francisco, California, and within said district.

3.

That said above-entitled cause was instituted and is pending herein and it is sought thereby, on behalf of said libelant to recover from said respondent \$7,500, the alleged value of a certain lighter belonging to said libelant and chartered by it to said respondent and lost shortly before the commencement of this action. [22]

4.

That in and by the charter-party made and entered into by and between libelant and respondent respecting said lighter, and whereon this action is based, it

is provided that said respondent shall only be responsible for loss of said lighter in case the same shall be lost for any cause not covered by the policy or policies of insuring existing thereon, or from any cause to which the insurer could make a successful defense against paying the said policies.

5.

That after said charter between libellant and respondent and before the commencement of this action, said respondent, with the consent and knowledge of said libellant, rechartered said lighter to the Napa Gravel and Material Company, a corporation, and delivered the same to it, and that it was provided in said recharter to said last-named corporation that it should be responsible to said respondent for the loss of said lighter from any cause not covered by the policy or policies of insurance existing thereon. That said lighter was lost while in the sole possession, control and custody of said Napa Gravel and Material Company, the exact cause of said loss being unknown to petitioner.

6.

That the said American Bonding Company of Baltimore as a part of the same transaction executed in favor of said respondent a bond of indemnity wherein and whereby it agreed to indemnify the said respondent against any loss under said recharter to said Napa Gravel and Material Company, and secured the faithful performance of said charter by said Napa Gravel and Material Company, including [23] the said provision as to loss of the said lighter as aforesaid.

7.

That respondent before making and filing this Petition has sought to dispose of certain preliminary objections to libel herein, which objections, if sustained by this Court, would have caused the dismissal of this entire cause. That this Court has ruled adversely to respondent upon said objections; that said respondent has in writing requested said Napa Gravel and Material Company and said American Bonding Company of Baltimore to become parties hereto and to undertake the defense thereof in the place and stead of respondent, but they have both failed and declined so to do.

8.

That in law and justice any judgment that may be or could be rendered against said respondent herein should be paid and satisfied and borne by said Napa Gravel and Material Company and its said surety American Bonding Company of Baltimore.

9.

That by making said Napa Gravel and Material Co. and said American Bonding Co. of Baltimore parties hereto this said controversy respecting the loss of said lighter and the responsibility therefor, which is the sole purpose of said Libel filed herein, can be wholly ascertained and adjusted in this one cause, and a multiplicity of actions and great expense avoided, and full and complete justice can be done in this said cause to all parties at the same time, and that for the reasons said last two named corporations are proper and necessary parties hereto, and to the full determination hereof. [24]

10.

That said respondent has filed or does herewith file proper stipulation, with sufficient surety, for damages and costs.

11.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

WHEREFORE, petitioner prays that this Honorable Court order the filing hereof, and that process forthwith issue hereon against said Napa Gravel and Material Company, a corporation, and against said American Bonding Company of Baltimore, a corporation, and that said parties be cited to appear and answer on oath this Petition and the Libel filed herein, or if the Court shall otherwise so determine, that an order to show cause be issued against said parties to this end; that said new parties, said two corporations, be made and become parties hereto as if originally joined and plead herein and that respondent be relieved of all liability herein, and for such other and further process, judgment, order and relief as to law and justice may appertain.

SHELDON G. KELLOGG and
EDWIN T. COOPER,

Proctors for Petitioner, Bennett and Goodall.

State of California,

City and County of San Francisco,—ss.

Edwin T. Cooper, being first duly sworn, deposes and says: That he is the secretary of said respondent and petitioner, said Bennett & Goodall, a corporation, and that he is authorized to make and makes this affi-

davit on its behalf and for its benefit; that he has read the foregoing Petition and knows the contents thereof, and that [25] the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters that he believes them to be true.

EDWIN T. COOPER.

Subscribed and sworn to before me, this 13th day of April, 1909.

[Seal]

ADELINE COPELAND,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Apr. 14, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. [26]

[Chamber Order Making Napa Gravel & Material Co. and American Bonding Co. Parties.]

In the District Court of the United States, in and for the Northern District of California.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a Corporation,

Libelant,

vs.

BENNETT & GOODALL, a Corporation,

Respondent.

Upon reading the verified petition of Bennett & Goodall, respondent herein, and good cause appearing therefor;

IT IS HEREBY ORDERED: That said Petition be filed and that process issue thereon against said

Napa Gravel & Material Company, a corporation, and said American Bonding Company of Baltimore, a corporation, and that they be and hereby are made parties hereto.

Dated April 14, 1909.

JOHN J. DE HAVEN,

Judge.

[Endorsed]: Filed Apr. 14, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. [27]

[Order of Court Making Napa Gravel & Material Co. and American Bonding Co. Parties.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom, thereof, in the City and County of San Francisco, on Wednesday, the 14th day of April in the year of our Lord, one thousand nine hundred and nine. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 13,686.

AMERICAN-HAWAIIAN S. S. CO.

vs.

BENNETT & GOODALL.

An motion of E. T. Cooper, Esqr., proctor for respondent, by the Court ordered that the petition for the bringing in of new parties in this cause be filed, and that process issue thereon against the Napa Gravel & Material Company, a corporation, and the American Bonding Company of Baltimore, a corpo-

ration, and that they be and hereby are made parties hereto. [28]

*In the District Court of the United States, in and
for the Northern District of California.*

No. 13,686.

AMERICAN-HAWAIIAN STEAMSHIP COM-
PANY, a Corporation,

Libellant,

vs.

BENNETT & GOODALL, a Corporation,

Respondent.

**Acknowledgment of Service of Petition and
Waiver of Citation, etc.**

We, the undersigned, proctors for libellant, hereby acknowledge the receipt of a copy of the Petition for bringing in new parties filed in the above-entitled matter on April 15th, 1909, and waive the issuance and service of citation thereon.

Dated April 20, 1909.

ANDROS & HENGSTLER,
Proctors for Libellant.

[Endorsed]: Filed April 27, 1909. Jas. P. Brown,
Clerk. [29]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 13,686.

AMERICAN-HAWAIIAN STEAMSHIP COM-
PANY (a Corporation),

Libellant,

vs.

BENNETT & GOODALL (a Corporation), NAPA
GRAVEL AND MATERIAL CO. (a Cor-
poration), and AMERICAN BONDING
COMPANY OF BALTIMORE,

Respondents.

**Exceptions [of Napa Gravel & Material Co.] to
Libel and Petition.**

Now comes Napa Gravel and Material Company,
a corporation, and answering the citation heretofore
issued herein requiring this respondent to answer the
above libel and the petition of Bennett & Goodall
praying that this respondent be made a party to said
libel, this respondent, Napa Gravel and Material
Company, excepts to said libel and petition upon the
following grounds:

I.

That it does not appear from said libel and peti-
tion, or from any of the pleadings or proceedings
herein, that this respondent is either a proper or a
necessary party to said libel.

II.

That it does not appear from said petition, or from
any of the pleadings or proceedings herein, that it

is necessary that this respondent be made a party to said libel in order to secure a full, complete and final determination of all questions in controversy herein.
[30]

III.

That the controversy between the libellant and the respondent, Bennett & Goodall, can be fully and finally determined without making this respondent a party to said libel.

IV.

That it does not appear that this respondent was a party to, or interested in the charter between the libellant and the respondent, Bennett & Goodall, and upon which charter said libel was brought, and for that reason, this respondent is neither a proper or necessary party to said libel.

V.

That it affirmatively appears from said libel and petition that the alleged liability of this respondent to the respondent, Bennett & Goodall, which charter was and is wholly independent of and not connected with the charter or agreement upon which the within libel is predicated.

VI.

That it does not appear from said petition that any cause of action exists in favor of the respondent, Bennett & Goodall, against this respondent, but, to the contrary, it appears therefrom that this respondent became liable to the respondent, Bennett & Goodall, only for such loss as might result to the chartered lighter from any cause not covered by the policy or policies of insurance existing thereon; and

it does not appear from said petition or from any of the pleadings or proceedings herein that the loss of said lighter resulted from any cause not covered by the policy or policies of insurance existing thereon.

VII.

That it does not appear from said libel or said petition, or any of the pleadings or proceedings herein, that it [31] has ever been determined whether the alleged loss of said lighter was covered by the policy or policies of insurance existing thereon, or that the alleged loss resulted from a cause to which the insured could make a successful defense against paying said policies.

VIII.

That Napa Gravel and Material Company is not a proper party to said libel, for the reason that it cannot be bound by any judgment or decree that may be rendered herein in favor of the libellant and against the respondent, Bennett & Goodall, and for the further reason that if made a party hereto, this respondent will not enjoy the right of appeal or other remedies in respect to any decree or judgment that may be entered between the libellant and the respondent, Bennett & Goodall, giving effect to or construing the charter upon which this libel is founded, or determining the liability of the insurer for the loss of said lighter.

WHEREFORE, this respondent prays to be hence dismissed with costs.

THEODORE A. BELL,

Proctor for Napa Gravel and Material Company.

Service by copy of the within Exceptions to libel and petition admitted this 27th day of April, 1909.

EDWIN T. COOPER and
SHELDON G. KELLOGG,
Attorneys for Respondent and Petitioner Bennett
& Goodall.

[Endorsed]: Filed Apr. 27, 1909. Jas. P. Brown,
Clerk. By Francis Krull, Deputy Clerk. [32]

*In the District Court of the United States, in and
for the Northern District of California.*

No. 13,686.

AMERICAN-HAWAIIAN STEAMSHIP COM-
PANY (a Corporation),

Libellant,

vs.

BENNETT & GOODALL (a Corporation), NAPA
GRAVEL AND MATERIAL CO. (a Cor-
poration), and AMERICAN BONDING
COMPANY OF BALTIMORE,

Respondents.

**Exceptions [of American Bonding Co.] to Libel and
Petition.**

Now comes American Bonding Company of Balti-
more, a corporation, and answering the citation here-
tofore issued herein requiring this respondent to
answer the above libel and the petition of Bennett
& Goodall praying that this respondent be made a
party to said libel, this respondent, American Bond-
ing Company of Baltimore, excepts to said libel and

petition upon the following grounds :

I.

That it does not appear from said libel or petition, or from any of the pleadings or proceedings herein, that this respondent is either a proper or a necessary party to said libel.

II.

That it does not appear from said petition, or from any of the pleadings or proceedings herein, that it is necessary that this respondent be made a party to said libel in order to [33] secure a full, complete and final determination of all questions in controversy therein.

III.

That the controversy between the libellant and the respondent, Bennett & Goodall, can be fully and finally determined without making this respondent a party to said libel.

IV.

That it does not appear that this respondent was a party to or interested in the charter between the libellant and the respondent, Bennett & Goodall, and upon which charter said libel was brought, and for that reason, this respondent is neither a proper or necessary party to said libel.

V.

That it affirmatively appears from said libel and petition that the alleged liability of this respondent to the respondent, Bennett & Goodall, is based upon a charter by said last-named respondent to the Napa Gravel and Material Company, which charter was and is wholly independent of, and not connected with,

the charter or agreement upon which the within libel is predicated.

VI.

That it does not appear from said petition that any cause of action exists in favor of the respondent, Bennett & Goodall, against this respondent, but, to the contrary, it appears therefrom that this respondent became liable to the respondent, Bennett & Goodall, only for such loss as might result to the chartered lighter from any cause not covered by the policy or policies of insurance existing thereon; and it does not appear from said petition or from any of the pleadings or proceedings herein that the loss of said lighter resulted from any cause not covered by the policy or policies of insurance existing thereon.

[34]

VII.

That it does not appear from said libel or said petition, or any of the pleadings or proceedings herein, that it has ever been determined whether the alleged loss of said lighter was covered by the policy or policies of insurance existing thereon, or that the alleged loss resulted from a cause to which the insurer could make a successful defense against paying said policies.

VIII.

That American Bonding Company of Baltimore is not a proper party to said libel, for the reason that it cannot be bound by any judgment or decree that may be rendered herein in favor of the libellant and against the respondent, Bennett & Goodall, and for the further reason that if made a party hereto, this

respondent will not enjoy the right of appeal or other remedies in respect to any decree or judgment that may be entered between the libellant and the respondent, Bennett & Goodall, giving effect to or construing the charter upon which this libel is founded, or determining the liability of the insurer for the loss of said lighter.

WHEREFORE, this respondent prays to be hence dismissed with costs.

JESSE W. LILIENTHAL,
ALBERT RAYMOND,

Proctors for American Bonding Company of Baltimore.

Dated May 18, 1909.

Due admission of same this day admitted this 18th of May, 1909.

SHELDON G. KELLOGG and
EDWIN T. COOPER,

Attys. for Respondent.

ANDROS & HENGSTLER,
Proctors for Libellant.

[Endorsed]: Filed May 18, 1909. Jas. P. Brown,
Clerk. By Francis Krull, Deputy Clerk. [35]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 17th day of August, in the year of our Lord, one thousand nine hundred and nine. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 13,686.

AMERICAN-HAWAIIAN STEAMSHIP COM-
PANY

vs.

BENNETT and GOODALL et al.

Order Submitting Exceptions to Libel, etc.

The exceptions of the American Bonding Company of Baltimore to the libel and petition herein, this day came on for hearing, Albert Raymond, Esqr., proctor for respondent, appearing for and Edwin T. Cooper, Esqr., proctors for Bennett and Goodall, appearing against said exceptions, and after hearing argument, by the Court ordered that said exceptions be, and they are hereby submitted to the Court for decision.

[36]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 2d day of September, in the year of our Lord, one thousand nine hundred and nine. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 13,686.

AMERICAN-HAWAIIAN S. S. CO.

vs.

BENNETT & GOODALL et al.

**[Order Overruling Exceptions of Napa Gravel and
Material Co. to Libel and Petition, etc.]**

The exceptions of the Napa Gravel and Material

Company to the libel and petition herein, having been heretofore submitted to the Court for decision, now after due consideration had thereon, by the Court ordered that said exceptions be, and the same are hereby overruled and said respondent is hereby allowed ten days in which to answer said libel and petition. [37]

**[Answer of American Bonding Co. to Original Libel,
and to Petition.]**

*In the District Court of the United States, in and
for the Northern District of California.*

No. 13,686.

AMERICAN-HAWAIIAN STEAMSHIP CO., a
Corporation,

Libelant,

vs.

BENNETT & GOODALL, a Corporation,

Respondent.

Now comes AMERICAN BONDING COMPANY OF BALTIMORE, impleaded herein as respondent upon the petition of BENNETT AND GOODALL, respondent herein, and for answer to the original libel filed herein alleges:

I.

That it has no information or belief upon the subject sufficient to enable it to answer any of the allegations in said libel in that behalf contained, and basing its denial on that ground, it denies each and every of the allegations contained in paragraph III

thereof, and each of the matters and things therein contained.

II.

And for the same reason and upon the same ground, it denies each and every of the allegations contained in paragraph IV thereof, and each of the matters and things therein contained.

III.

And for the same reason and upon the same ground, it denies each and every of the allegations contained in paragraph V thereof, and each of the matters and things therein contained. [38]

IV.

And for the same reason and upon the same ground, it denies each and every of the allegations contained in paragraph VI thereof, and each of the matters and things therein contained.

V.

And for the same reason and upon the same ground, it denies each and every of the allegations contained in paragraph VII thereof, and each of the matters and things therein contained.

AND FOR ANSWER TO THE PETITION OF SAID BENNETT AND GOODALL, respondent, said AMERICAN BONDING COMPANY OF BALTIMORE alleges:

I.

That it has no information or belief upon the subject sufficient to enable it to answer any of the allegations in said petition in that behalf contained, and basing its denial on that ground, it denies each and every of the allegations contained in paragraph

IV thereof, and each of the matters and things therein contained:

II.

It admits that before the commencement of this action said original respondent rechartered said lighter to said NAPA GRAVEL AND MATERIAL COMPANY, and in this behalf it attaches hereto as Exhibit "A," and makes a part hereof, a copy of said recharter, and it denies each and every of the allegations of said petition relative to said recharter, other than as set forth in said Exhibit "A."

III.

It admits that said AMERICAN BONDING COMPANY OF BALTIMORE, as a part of the same transaction, executed a bond of indemnity, and in this behalf it attaches hereto as Exhibit [39] "B," and makes a part hereof, a copy of the bond of indemnity so executed by it, and it denies each and every of the allegations of said petition relative to said bond, other than as set forth in said Exhibit "B."

IV.

That as this respondent is informed and believes, the damage or loss caused to said lighter was such as is and was coverable by policies of insurance insuring said lighter against damage or loss by accident or fire.

V.

It denies that in law or in justice any judgment that might or could be recovered against said BENNETT & GOODALL should be paid or satisfied or borne by said AMERICAN BONDING COMPANY OF BALTIMORE.

VI.

It denies that all and singular the premises in said petition set forth are true.

WHEREFORE, said AMERICAN BONDING COMPANY OF BALTIMORE prays to be hence dismissed.

JESSE W. LILIENTHAL,
ALBERT RAYMOND,

Attorneys for Respondent American Bonding Company of Baltimore. [40]

EXHIBIT "A,"

THESE ARTICLES OF AGREEMENT made and entered into this 25th day of March, A. D. 1907, at San Francisco, California, between BENNETT & GOODALL, a corporation, organized under the laws of the State of California, with its principal place of business at San Francisco, hereinafter called the first party, and NAPA GRAVEL & MATERIAL COMPANY, a corporation, organized under the laws of said State, with its principal place of business at Napa, in said State, hereinafter called the second party,

WITNESSETH:

That the said first party has this day chartered and let unto said second party, and said second party has this day hired and taken from said first party those two certain barges known and designated by the numbers 1 and 2, and owned by the American Hawaiian Steamship Company and chartered by said owner to said first party with power to subcharter the same, upon the following express terms, payments and conditions, viz.:

1st. The entire barges are hereby let and surrendered to said second party who shall have exclusive control thereof and shall solely bear and pay all expenses of equipping, manning and operating the same, and also all wharfage therefor.

2nd. Said barges are rented and chartered hereby from month to month only and expressly subject to thirty days' written notice of cancellation of charter given by either party to the other, and also subject to the right of the first party and of the owner of said barges as specified in the next succeeding paragraph.

In the event that the owner of said barges desires them or either of them, for use in its or their own business at any time or times, they shall be **returned and** surrendered [41] by second party upon seven days' written notice to that effect, but shall be again delivered to second party immediately upon being released by said owner, and such demands of said owner and consequent interruptions of the use of either or both said barges by said second party shall not avoid or affect the Articles or release second party therefrom, excepting only that second party shall not be compelled to pay said hire and compensation herein specified during the time that second party shall be actually deprived of use of said barges pursuant to this paragraph; said payments and compensation to recommence immediately in each case upon the redelivery of said barges to second party. The taking by the owner of one barge hereunder shall not effect these Articles or release second party from the payment of the rental herein named for the remaining

barge which it shall continue to use at the rate named hereinbelow.

4th. Rate and compensation to be paid by second party to first party shall be and is fixed at \$30. per day for each barge, payable at the place, time and in the manner following, that is to say:

Ten days' charter money at the rate of \$30. per day for each barge to be paid in advance every ten days during the first month, the first payment for the first ten days to be made upon the signing of these presents; and on and after the first month from the date hereof, and commencing 30 days from the date hereof, payments shall be made every 15 days in advance for the 15 days next succeeding. All payments hereunder to be made in United States Gold Coin and at the office of first party in said City of San Francisco.

5th. Second party shall be fully responsible for, and shall pay on demand any and all damages and deterioration [42] to said barges and to each and both of them not directly due to ordinary wear and tear or not included in and covered by the insurance policies now or hereafter in existence insuring the said barges.

6th. Second party shall erect side boards but no stanchions or braces for the same shall be run through the decks of said barges or either of them.

7th. Upon termination hereof or upon call for said barges as herein provided for, second party shall surrender the same and both thereof entirely free and clear and exempt from and of all incumbrances, libels, liens, attachments and claims of every kind and description, whether for wages, services, repairs,

supplies, materials or necessities or otherwise, and absolutely exempt from any and all demands affecting said barges or either of them, or first party or the owner thereof, made or suffered by said second party, its agents, employes, or others acting or claiming to act by, for or under it.

8th. Second party agrees upon the signing hereof and as part of this transaction to secure and cause to be delivered a surety bond satisfactory to the first party, in due legal form, and in the sum or amount of \$15,000. securing to the first party and guarantying the full and faithful performance of these Articles of Agreement by second party, and the making of the payments and payment of any and all damages by second party herein provided for, or stipulated or implied hereunder.

IN WITNESS WHEREOF, said first party and said second party have hereunto set their corporate names and caused their corporate seals to be affixed, each by its proper officers thereunto first duly authorized by resolution, the day and year first hereinabove written. [43]

BENNETT & GOODALL (First Party),
By H. W. GOODALL,
Pres.

NAPA GRAVEL AND MATERIAL
COMPANY (Second Party),
By GEO. B. POWERS,
General Manager.
THEODORE A. BELL,
Secretary.

EXHIBIT "B."

KNOW ALL MEN BY THESE *THESE* PRESENTS, That we, NAPA GRAVEL AND MATERIAL COMPANY, a corporation organized and existing under the laws of the State of California, as principal, and AMERICAN BONDING COMPANY OF BALTIMORE, a corporation organized and existing under the laws of the State of Maryland, and duly authorized and licensed to transact a general surety business in the State of California, as surety, are held and firmly bound unto BENNETT & GOODALL, a corporation, in the sum of Fifteen Thousand Dollars (\$15,000.00) gold coin of the United States of America, to be paid to said BENNETT & GOODALL, its successors or assigns, for which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That whereas, on the 25th day of March, A. D. 1907, certain ARTICLES OF AGREEMENT were made and entered into between BENNETT & GOODALL and NAPA GRAVEL AND MATERIAL COMPANY whereby the said NAPA GRAVEL AND MATERIAL COMPANY has chartered from said BENNETT & GOODALL two (2) certain barges known and designated by the numbers 1 and 2 and owned by the AMERICAN-HAWAIIAN STEAMSHIP COMPANY, which said agreement is hereby referred to and made a part of this bond;

NOW, THEREFORE, if the said NAPA

GRAVEL AND MATERIAL COMPANY shall faithfully perform all the obligations of the aforesaid agreement then this obligation shall be null and void; otherwise to remain in full force and virtue for the period of one year from this date.

PROVIDED HOWEVER, That the Surety shall not in any event be liable for the payment of any damage or loss coverable by the policies of insurance insuring said barges against damage, or loss by accident or fire. [45]

IN TESTIMONY WHEREOF the said NAPA GRAVEL AND MATERIAL COMPANY has affixed its seal and caused its name to be subscribed by its Secretary, Theodore A. Bell, this 28th day of March, A. D. 1907, and said surety has caused this instrument to be executed by its Agent and Attorney-in-Fact, at San Francisco, California, this 28th day of March, A. D. 1907.

NAPA GRAVEL AND MATERIAL COMPANY,

By THEODORE A. BELL,
Secretary.

AMERICAN BONDING COMPANY OF
BALTIMORE,

By JOY LICHTENSTEIN,
Agent and Attorney-in-Fact. [46]

State of California,
City and County of San Francisco,—ss.

Joy Lichtenstein, being duly sworn, deposes and says: That deponent is an officer, to wit, the general agent of the American Bonding Company of Balti-

more, respondent herein, in the above-entitled action. That deponent has read the above and foregoing answer and knows the contents thereof; that the same is true of deponent's own knowledge, except as to the matters which are therein stated on deponent's information or belief; and as to those matters, that deponent believes it to be true. That said respondent is a corporation, and deponent makes this affidavit for it and on its behalf.

JOY LICHTENSTEIN.

Subscribed and sworn before me, this 9th day of October, 1909.

[Seal]

ANNE F. HASTY,

Notary Public in and for said City and County of
San Francisco, State of California.

Due service hereof by copy is admitted this 11th day of October, 1909.

SHELDON F. KELLOGG,

EDWARD COOPER,

Attorneys for Bennett & Goodall.

Receipt of copy admitted this 11th day of October, 1909.

ANDROS & HENGSTLER,

Proctors for Libellant.

[Endorsed]: Filed Oct. 11, 1909. Jas. P. Brown,
Clerk. By M. Thomas Scott, Deputy Clerk. [47]

[Answer of Napa Gravel & Material Co. to Original Libel.]

In the District Court of the United States, in and for the Northern District of California.

No. 13,686.

AMERICAN-HAWAIIAN STEAMSHIP CO. (a Corporation),

Libelant,

vs.

BENNETT & GOODALL (a Corporation),

Respondent.

ANSWER OF NAPA GRAVEL & MATERIAL COMPANY (a Corporation).

Now comes the Napa Gravel & Material Company (a corporation), impleaded herein as respondent upon the petition of Bennett & Goodall (a corporation), respondent herein, and for answer to the original Libel filed herein admits, alleges and denies as follows:

I.

Admits the allegations contained in paragraphs 1 and 2 of said Original Libel.

II.

Alleges that it has no information or belief upon the subject sufficient to enable it to answer any of the allegations of paragraph 3 of said original Libel, and, basing its denial upon that ground, this respondent denies each and all of the allegations contained in said paragraph 3, and each and all of the matters and things therein contained.

III.

For the same reason and upon the same ground alleged in paragraph 2 of this Answer, this respondent denies each and every allegation contained in paragraph 4 of said original Libel and each and all of the matters and things therein [48] contained.

IV.

For the same reason and upon the same ground alleged in paragraph 2 of this Answer, this respondent denies each and all of the allegations contained in paragraph 5 of said original Libel, and each and all of the matters and things therein contained.

V.

For the same reason and upon the same ground alleged in paragraph 2 of said original Libel, this respondent denies each and all of the allegations contained in paragraph 6 of said original Libel, and each and all of the matters and things therein contained.

VI.

For the same reason and upon the same ground alleged in paragraph 2 of this Answer, this respondent denies each and all of the allegations contained in paragraph 7 of said original Libel, and each and all of the matters and things therein contained.

And for answer to the petition of said Bennett & Goodall (a corporation), respondent herein, the Napa Gravel & Material Company (a corporation), admits, alleges and denies as follows:

I.

Admits the allegations of paragraphs 1, 2 and 3 of said petition.

II.

Alleges that it has no information or belief upon the subject sufficient to enable it to answer any of the allegations contained in paragraph 4 of said Petition, and, basing its denial on that ground, this respondent denies each and all of the allegations contained in said paragraph 4 of said Petition, and each and all of the matters and things therein [49] contained.

III.

Admits that before the commencement of this action, the said Bennett & Goodall rechartered said lighter to this respondent, Napa Gravel & Material Company (a corporation), under a certain agreement or charter in writing, a copy of which is hereto attached and marked Exhibit "A," and made a part hereof, and denies each and all of the allegations of said Petition relative to said new charter, other than as set forth in said Exhibit "A."

IV.

Admits that the American Bonding Company of Baltimore, as part of the same transaction, issued a bond of indemnity, and in this behalf, attaches hereto as Exhibit "B," and makes a part hereof, a copy of said bond of indemnity, and it denies each and all the allegations of said Petition relative to said bond, other than as set forth in said Exhibit "B."

V.

Denies that in law or in justice any judgment that might or could be recovered against said Bennett & Goodall should be paid, or satisfied, or borne by this respondent, Napa Gravel & Material Company.

VI.

Denies that by making said Napa Gravel & Material Company a party to this action, the controversy respecting the loss of said lighter, and the responsibility thereof, can be wholly ascertained, or adjusted, in this one cause, or a multiplicity of actions of great expense avoided, or full or complete justice can be done in said cause to all parties at the same time, or that for the reasons set forth in paragraph 9 of said Petition, or for any other reasons, this respondent, Napa Gravel and Material Company is a proper or necessary party hereto, or to the full determination hereof. [50]

VII.

Denies that all or singular the premises set forth in said petition are true.

VIII.

Alleges that the damage or loss caused to said lighter was such as is and was coverable by policies of insurance, insuring said lighter against damage or loss by accident or fire.

IX.

Alleges that said lighter was lost without fault or neglect upon the part of this respondent, Napa Gravel & Material Company.

WHEREFORE, said Napa Gravel & Material Company (a corporation) prays to be hence dismissed.

THEODORE A. BELL,

Proctor for Respondent, Napa Gravel & Material Company. [51]

EXHIBIT "A."

These Articles of Agreement made and entered into this 25th day of March A. D. 1907, at San Francisco, California, between Bennett & Goodall, a corporation, organized under the laws of the State of California, with its principal place of business at San Francisco, hereinafter called the first party, and Napa Gravel and Material Company, a corporation, organized under the laws of said State, with its principal place of business at Napa, in said State, hereinafter called second party,

WITNESSETH:

That the said first party has this day chartered and let unto said second party, and said second party has this day hired and taken from said first party those two certain barges known and designated by the numbers 1 and 2, and owned by the American-Hawaiian Steamship Company and chartered by said owner to said first party with power to subcharter the same, upon the following express terms, payments and conditions, viz.:

1st. The entire barges are hereby let and surrendered to said second party who shall have exclusive control thereof and shall solely bear and pay all expenses of equipping, manning and operating the same, and also all wharfage therefor.

2d. Said barges are rented and chartered hereby from month to month only and expressly subject to thirty days' written notice of cancellation of charter given by either party to the other and also subject to the right of the first party and of the owner of said barges as specified in the next preceding paragraph.

In the event that the owner of said barges desires them or either of them, for use in its or their own business at any time or times, they shall be returned and surrendered [52] by second party upon seven days' written notice to that effect, but shall be again delivered to second party immediately upon being released by said owner, and such demands of said owner and consequent interruptions of the use of either or both said barges by said second party shall not avoid or affect the articles or release second party therefrom, excepting only that second party shall not be compelled to pay said hire and compensation herein specified during the time that second party shall be actually deprived of use of said barges pursuant to this paragraph; said payments and compensation to recommence immediately in each case upon the redelivery of said barges to second party. The taking by the owner of one barge hereunder shall not effect these Articles or release *second* party from the payment of the rental herein named for the remaining barge when it shall continue to use at the rate named hereinbelow.

4th. Rate and compensation to be paid by second party to first party shall be and is fixed at \$30 per day for each barge, payable at the place, time, and in the manner following, that is to say:

Ten days' charter money at the rate of \$30. per day for each barge to be paid in advance every ten days during the first month, the first payment for the first ten days to be made upon the signing of these presents; and on and after the first month from the date hereof, and commencing 30 days from the

date hereof, payments shall be made every fifteen days in advance for the 15 days next succeeding. All payments hereunder to be made in United States Gold Coin at the office of first party in said City of San Francisco.

5th. Second party shall be fully responsible for, and shall pay on demand any and all damages and deterioration [53] to said barges and to each and both of them not directly due to ordinary wear and tear, or not included in and covered by the insurance policies now or hereafter in existence insuring the said barges.

6th. Second party shall erect sideboards but no stanchions or braces for the same shall be run through the decks of said barges or either of them.

7th. Upon termination hereof, or upon call for said barges as herein provided for, second party shall surrender the same and both thereof entirely free and clear and exempt from and of all incumbrances, libels liens, attachments and claims of every kind and description, whether for wages, services, repairs, supplies, materials or necessities or otherwise, and absolutely exempt from any and all demands effecting said barges, or either of them, or first party or the owner thereof, made or suffered by said second party, its agents, employes, or others acting or claiming to act, by, for or under it.

8th. Second party agrees upon the signing hereof, and as part of this transaction to secure and cause to be delivered a surety bond satisfactory to the first party, in due legal form, and in the sum or amount of \$15,000, securing to the first party and guaranty-

ing the full and faithful performance of these Articles of Agreement by second party, and the making of the payments and payment of any and all damages by second party herein provided for, or stipulated or implied hereunder.

IN WITNESS WHEREOF, said first party and said second party have hereunto set their corporate names and caused their corporate seals to be affixed, each by its proper officers thereunto first duly authorized by Resolution, the day and year first hereinabove written.

BENNETT & GOODALL (First Party),
[54]

By H. W. GOODALL, Pres.
NAPA GRAVEL AND MATERIAL COM-
PANY (Second Party),

By GEO. B. POWERS,
General Manager.
THEODORE A. BELL,
Secretary. [55]

EXHIBIT "B."

Know all men by these presents: That we, Napa Gravel and Material Company, a corporation organized and existing under the laws of the State of California, as principal, and American Bonding Company of Baltimore, a corporation organized and existing under the laws of the State of Maryland, and duly authorized and licensed to transact a general surety business in the State of California, as surety, are held and firmly bound unto Bennett & Goodall, a corporation, in the sum of \$15,000, gold coin of the United States of America, to be paid to

said Bennett & Goodall, its successors or assigns, for which payment well and truly to be made, we bond ourselves, our successors and assigns, jointly and severally, firmly by these presents.

The condition of the above obligation is such that whereas, on the 25th day of March, A. D. 1907, certain Articles of Agreement were made and entered into between Bennett & Goodall and Napa Gravel and Material Company whereby the said Napa Gravel and Material Company has chartered from said Bennett & Goodall two (2) certain barges known and designated by the numbers 1 and 2, and owned by the American-Hawaiian Steamship Company, which said agreement is hereby referred to and made a part of this bond.

Now, therefore, if the said Napa Gravel & Material Company shall faithfully perform all the obligations of the said agreement then this obligation shall be null and void; otherwise to remain in full force and virtue for the period of one year from this date.

Provided, however, that the surety shall not in any event be liable for the payment of any damage or loss coverable by policies of insurance insuring said barges against damage or loss by accident or fire.

[56]

In testimony whereof, the said Napa Gravel & Material Company has affixed its seal, and caused its name to be subscribed by its Secretary, Theodore A. Bell, this 28th day of March, A. D. 1907, and said surety has caused this instrument to be executed by its agent and Attorney-in-Fact, at San Francisco,

California this 28th day of March, A. D. 1907.

NAPA GRAVEL AND MATERIAL COM-
PANY.

By THEODORE A. BELL,
Secretary.

AMERICAN BONDING COMPANY OF
BALTIMORE.

By JOY LICHTENSTEIN,
Agent and Attorney-in-Fact. [57]

State of California,
City and County of San Francisco,—ss.

Theodore A. Bell, being duly sworn, deposes and says: That deponent is an officer, to wit; Secretary of the "Napa Gravel and Material Company," respondent in the above-entitled action, and that he makes this affidavit in behalf of said corporation. That deponent has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief; and as to those matters, that he believes it to be true.

THEODORE A. BELL.

Subscribed and sworn to before me this 11th day of November, 1909.

[Seal]

JAMES J. GLOVER,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 15, 1909. Jas. P. Brown,
Clerk. By M. Thomas Scott, Deputy Clerk. [58]

[Minutes—January 11, 1912—Trial.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco on Thursday, the 11th day of January, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable R. S. BEAN, Judge.

No. 13,686.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY

vs.

BENNETT AND GOODALL et al.

This cause this day came on for trial, L. T. Hengstler, Esqr., appearing for libelant, and Wm. Denman and E. T. Cooper, appearing for respondent Bennett & Goodall, and Theo. A. Bell, Esqr., appearing for respondent, the Napa Material and Gravel Co., and Albert Raymond, Esqr., appearing for respondent, the American Bonding Company. Mr. Hengstler stated the case to the Court. Mr. Denman introduced in evidence the deposition of John P. Latimore, and called Thomas Crowley, Wm. J. Fisher, Christian Johnson and Jas. H. Bennett, who were each duly sworn and examined as witnesses on behalf of respondents, and thereupon the hour of adjournment having arrived, the further hearing of this cause was continued until Jan. 12, 1912, at 10 o'clock A. M. [59]

[Minutes—January 12, 1912—Trial (Resumed).]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 12th day of January, in the year of our Lord, one thousand nine hundred and twelve.
Present: The Honorable R. S. BEAN, Judge.

No. 13,686.

AMERICAN-HAWAIIAN S. S. CO.

vs.

BENNETT & GOODALL.

The trial of this cause was resumed. Mr. Hengstler, proctor for libelant, recalled Jas. H. Bennett for further cross-examination. Mr. Denman, proctor for one of the respondents, called S. Pigot, Theo. A. Bell, who were each duly sworn and examined as witnesses on behalf of respondents. Mr. Hengstler called A. Hart, Jr., H. G. Bell, L. H. Fox, F. H. Caruthors, Duncan Buchanan, Geo. H. Pinkham and H. P. Young, who were each duly sworn and examined as witnesses on behalf of libelant. Mr. Denman recalled E. S. Pigot and Jas. H. Bennett and Wm. Fisher, who were further examined. The further trial of the cause was thereupon continued until to-morrow at 10 o'clock A. M. [60]

[Minutes—January 15, 1912—Trial (Resumed).]

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 15th day of January, in the year of our Lord, one thousand nine hundred and twelve. Present: The Honorable R. S. BEAN, Judge.

No. 13,686.

AMERICAN-HAWAIIAN STEAMSHIP CO.

vs.

BENNETT & GOODALL et al.

[Order of Submission of Cause.]

This cause this day came on for further argument and after hearing Theo. A. Bell, Esqr., E. T. Cooper, Esqr., and Wm. Denman for respondents and L. T. Hengstler, Esqr., for libelant, by the Court ordered that this cause be, and the same stand submitted to the Court for decision. [61]

[Proceedings Had January 11, 1912.]

*In the District Court of the United States, in and
for the Northern District of California, Divi-
sion No. 1.*

Hon. R. BEAN, Judge.

AMERICAN-HAWAIIAN STEAMSHIP COM-
PANY, a Corporation,

Libelant,

vs.

BENNETT & GOODALL et al.,

Respondents.

Thursday, January 11th, 1912.

Friday, January 12th, 1912.

APPEARANCES:

L. T. HENGSTLER, Esq., for the Libelant.

EDWIN T. COOPER, Esq., WILLIAM DEN-
MAN, Esq., for the Respondent, Bennett &
Goodall.

THEODORE A. BELL, Esq., for the Napa Gravel
and Material Company.

A. RAYMOND, Esq., for the American Bonding
Company.

(This libel now came on for hearing before the
Court in its regular order on the calendar and the
following proceedings were had:) **[62]**

[Statement of Mr. Hengstler, etc.]

Mr. HENGSTLER.—If your Honor please, this
libel is an action for damages for the loss of a
lighter which was chartered by the libelant, the

American-Hawaiian Steamship Company to the respondent, Bennett & Goodall.

The libel alleges that the libelant is a corporation, and the defendant is a corporation, both of which facts are admitted in the pleadings; that the libelant is the owner of "lighter No. 1," which fact is also admitted. The pleadings furthermore set out that on March 18th, 1907, a written charter was entered into between the libelant and the respondent. The terms of the charter are in the form of letters, as appear literally in Exhibit "A" of the answer. The pleadings admit on the part of the libelant the correctness of this charter Exhibit "A" of the answer of respondents Bennett & Goodall. Shall I read the charter to your Honor?

The COURT.—Yes, I shall be glad to have it read.

Mr. HENGSTLER.—The letter is on the letter-head of libelant in the following words:

"San Francisco, March 18th, 1907.

Messrs. Bennett & Goodall,

8 Mission Street,

San Francisco.

Dear Sirs:

Confirming conversation we had with you last Saturday, we hereby agree to rent you our lighters upon the following terms:"

I may say that the letter is signed by the Pacific Coast Manager of the American-Hawaiian Steamship Company, the libelant in this case.

"Rent to be \$450.00 per month for each lighter.

You have taken Lighter No. 2 at 7 A. M. March

12th, 1907, and rental of that lighter starts at that time."

This suit is not with reference to "lighter No. 2," but [63] with reference to "lighter No. 1":

"In case we need these lighters, we are to rent them from you at \$15.00 per day each, dating from the time they are delivered to us until you are notified that they are again at your disposal. We are to give you at least one week's notice, when we require them, or either of them, and if you cannot send them on a contemplated trip and get them back before the week is up, we will take them any time within that week, and if we have any call for them for a short time job, we will refer the inquiry to you, and you can hire them out to the parties so inquiring, providing that you bind yourself to return the lighter to us on the original notification date; you to agree to pay all losses incurred by us by reason of your failure to have the lighter at our disposal, after you have been given a week's notice."

Now comes the clause on which this case hinges:

"You are to be responsible for these lighters and whatever gear is on them when you take them, and are to return them in as good order and condition as when you get them, reasonable wear and tear and happenings covered by their present policies of insurance excepted.

You are particularly not to permit anything to be loaded on them or unloaded from them, in a manner that will twist or strain them, and if they are lost through any cause that will permit our underwriters to make a successful defense against paying the

face of the policies, you are to be responsible.

We are to keep the lighters insured, as they are now insured, and we are to pay the wharfage on them, while they are in our possession. You are to pay the wharfage at all other times.

We agree to keep them in repair, but this does not release [64] you from any obligation hereinbefore mentioned.

This agreement is subject to termination by either party on thirty (30) days' notice.

If this is not in accordance with your understanding, please advise.

Yours faithfully,

C. W. COOK,

Pacific Coast Manager."

There is another letter which has not much bearing on this case, but to make the contract complete I will read it—I beg your Honor's pardon. I find this letter is an important part of it. It is accepting the terms proposed in the other case.

"San Francisco, Cal., March 23, 1907.

Mr. C. W. Cook,

Pac. Coast Manager A. H. S. S. Co.

City.

Dear Sir:—

Replying to yours of the 18th inst. relative to chartering to us of the American-Hawaiian Steamship Company's barges #1 and #2. The terms of said charter as set forth in your communication referred to above, are entirely satisfactory to us and are hereby accepted.

In accordance with our conversation, the agreed value of barges, is Seventy-five hundred Dollars (\$7500.00) each.

Yours truly,

BENNETT & GOODALL."

These two letters compose the contract in suit in this case. The pleadings admit that this is the contract.

Mr. DENMAN.—We do not concede that, Dr. Hengstler. We do not concede that the pleadings admit it. Setting up the entire contract required the setting forth of the insurance [65] policy, because we are only to be liable for those losses not covered by the insurance policy, which policy is not set forth in the pleading. The libel sets forth no contract at all except a straight *to* promise to return the lighter. We deny that is the contract, and set up the letter showing the agreement was different from the one set forth in the libel. There is no allegation of breach in the contract of the one we set up.

Mr. HENGSTLER.—You will find that breach is alleged and that the contract is completely stated.

The next allegation of importance in the libel is that the respondent took possession of the two lighters after this agreement had been entered into. Then follows the allegation that the respondent has made it impossible to return, and has not returned said lighter, "Lighter No. 1," to respondent according to its said promise. In other words the libel is based on the theory that the libelant chartered the lighter to the respondent, that the respondent took

possession of it, that under the contract the lighter had to be returned, except under certain circumstances, that it never was returned, but was lost.

The same question that Mr. Denman now raises, if your Honor please, was raised before after the answer had been filed by respondent, and came up for argument before his Honor Judge De Haven on exceptions to the answer

The answer sets forth, that in order to make a case for itself the libelant had first to prove that it had made an attempt under this contract to collect the loss for the lighter from the insurance company; that that was a condition precedent for libelant's cause of action. Judge De Haven considered that matter, and wrote an opinion covering that condition as follows: [66]

“The exceptions to the answer will be sustained”—exceptions were taken to that theory with reference to insurance. “The obligation which the respondent assumed, under the contract set out in the answer, was to return the lighter, therein mentioned, to the libelant ‘in as good order and condition’ as when received from libelant, ‘reasonable wear and tear and happenings covered by their present policy of insurance excepted.’ ”

Our theory is that the lighter was not returned in as good order and condition, and that is our *prima facie* case; that this exception is matter of defense, and on that theory we argued this motion before Judge De Haven, and he sustained our argument.

“Reasonable wear and tear and happenings covered by their present policy of insurance excepted.”

This is the ruling of the Judge.

“The burden is upon the respondent to show”—

The burden is not on us. We make out our *prima facie* case by the allegations we make in the libel supplemented by admitted allegations in the answer.

“The burden is upon the respondent to show that said lighter was lost by some peril covered by the policy of insurance, referred to in the contract”—That, in other words, is matter of defense—“and the libelant is not required, as a condition precedent to the right to maintain this action to first seek to recover the value of such lighter from the insurance company, in which it was insured.”

And the exceptions were sustained, from which it follows that those parts of the answer which relied on that theory of respondents were stricken out under the motion.

All of the facts admitted by the pleadings make a *prima facie* case for the libelant, and the libelant rests upon this *prima facie* case made out by the pleadings.
[67]

Mr. DENMAN.—If your Honor please, I was called into this case two days ago, and have not seen the opinion of Judge De Haven. I was informed his ruling went off on the theory that the libelant did not set forth the contract at which exception had been aimed. However that may be your Honor will find on reading the contract that the specific promise with regard to the loss—there is a specific provision with regard to the loss—there is no showing of any breach of the provision; that we shall be responsible only for those losses which are not covered by the policy of in-

surance then in force. Our opponent has neither pleaded that policy that he is suing to recover on, nor put it in evidence. How is the Court to determine what the contract is that is presented to it for its consideration? We have not the policy. It is in the possession of the libelant. The libelant is suing on a contract of which that policy is a portion, which he has not set forth to the Court. It must be set forth *in toto* before there can be a recovery. We are not in a position to meet him in putting in our case. I call on the libelant to set up its entire contract with necessarily this clause which contains a risk for which we are not liable, and shows the balance of the risk for which we would be.

It is clearly incumbent on them to show what the contract is they are suing for.

Mr. HENGSTLER.—We show what the contract is. We do not have to show the defense.

The COURT.—You will have to proceed with the trial of the case in accordance with the view of Judge De Haven. This, I take it, must be the law of the case. He has passed on the law on the question.

Mr. DENMAN.—Dr. Hengstler, have you the insurance policy? [68]

Mr. HENGSTLER.—Yes, I can give you a copy.

Mr. DENMAN.—Let me have the original.

Mr. HENGSTLER.—I have only a copy. I have not the original. I would have gotten the original if I thought you wanted it, but I have never been called on to produce it. The first time that counsel asked me for a copy, I gave him a copy.

Mr. DENMAN.—Do you know of its execution?

Mr. COOPER.—Will you admit that that is a copy of the insurance policy? (Handing.)

Mr. HENGSTLER.—I will admit that that is a copy of the insurance policy.

Mr. DENMAN.—We offer in evidence an insurance policy on this particular lighter which policy was executed by the Sea Insurance Company on November 14th, 1906, a time policy for the period of one year expiring June 14th, 1907, at noon, the accident occurring within that period. Amongst other provisions the policy contains, at page 3, the following statement of the perils insured:

“Touching the adventures and perils which the said Sea Insurance Company is contented to bear”—This is the usual form of the declaration of the old English policy and is embodied in this—“For damages in this voyage, they are of the seas”—which we claim this loss is—“men-of-war, fires, enemies, pirates, rowers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrest, restraints and detriments of all kings, princes or people of what nation, condition or quality soever, barratry of the master and marines, and all other perils, losses and misfortunes that have, or shall come, to the hurt, detriment or damage to said vessel, or any part thereof, and in case of any loss or misfortune,” etc.

[69]

So that a policy then existed on the vessel, which is the policy referred to in the contract in question, for a loss for perils of the sea, and barratry.

Now, I will read to your Honor the deposition of John P. Lattimore taken by our opponents which we

will offer in evidence.

Mr. HENGSTLER.—You offer it in evidence.

Mr. DENMAN.—Yes. Under the admiralty rule the man is our opponent's witness, but the deposition is here, and we offer it. It is not a very long deposition, and I am going to read it to your Honor because it makes a picture of the case. What will subsequently be put in evidence very largely depends on this.

(Counsel proceeds and reads the deposition of John P. Lattimore.)

That is the testimony of the master of the "Pickett" as to the occurrences leading up to the wrecking of the vessel. There are joined in this case other parties, the sub-charterers of these two barges who took from the respondent under the agreement of the charter-party that they could sub-charter, and they have been made parties here to this action, and I will introduce in evidence the articles of agreement made with them together with a bond accompanying these articles chartering the vessel, and ask that they be marked Respondent's Exhibits "A" and "B." Any objection to that?

Mr. HENGSTLER.—No.

Mr. BELL.—Pardon me. In the course of time, the Napa Gravel & Material Company, who had sub-chartered the barge from Goodall & Bennett, respondents, and the American Bonding Company were made corespondents, or respondents in the case, and we filed exceptions at that time to our being brought in, claiming that, as a matter of law, any liability upon the part [70] of the Napa Gravel & Mate-

rial Company or the American Bonding Company could not be determined in this action between the American-Hawaiian Steamship Company and Bennett & Goodall. Those exceptions, however, were overruled, and I am not altogether familiar with the practice in this court, but I would like to reserve an exception to the introduction of any evidence that now tends to create any liability upon the part of the Napa Gravel & Material Company or the American Bonding Company, upon the ground that such matters cannot be litigated and determined in this proceeding.

The COURT.—You may reserve that objection.

Mr. DENMAN.—It is understood that all the testimony may be offered subject to that objection. I presume it would be well to read the charter. The point of this that the sub-charter makes the sub-charterers independent contractors, and that we had given the whole burden of the policy to them and had ceased our dominion over it. The effect of that, of course, will be taken up in the arguments.

These articles of agreement go on to recite the parties, which are Bennett & Goodall, the respondents here, and the Napa Gravel & Material Company, a corporation organized under the laws of New Jersey, with its principal place of business at Napa, witnesseth:

“That said first party has this day chartered and let unto said second party and said second party has this day hired and taken from said first party those two certain barges known and designated by the numbers One and Two, and owned by the American-

Hawaiian Steamship Company and chartered by said owner to said first party with power to sub-charter the same upon the following express terms, payments and conditions, viz.:

1st: The entire barges are hereby let and surrendered [71] to said second party who is to have exclusive control thereof and shall solely bear and pay all expenses of equipping, manning and operating the same, and also all wharfage therefor.

2nd: Said barges are rented and chartered hereby from month to month only and expressly subject to thirty days' written notice of cancellation of charter given by either party to the other, and also subject to the right of first party and of the owner of said barges as specified in the next succeeding paragraph."

The next paragraph provides for the return upon notice, excepting only that the second party shall not be compelled to pay said hire and compensation herein specified during the time that the second party shall be actually deprived of the use of said barge.

"4th: Rate and compensation to be paid by second party to first party shall be and is fixed at \$30 per day for each barge, payable at the place, time and in the manner following," indicating.

"5th: Second party shall be fully responsible for and shall pay on demand any and all damage and deterioration to said barges and to each and both of them not directly due to ordinary wear and tear or not included in and covered by the insurance policies now or hereafter in existence insuring the said barges."

"6th: Second party may erect sideboards but no

stanchions or braces for the same shall be run through the decks of said barges or either of them."

I will say, they were flat barges and no hold in them, and that the sides had to be built up on top of the flat deck to contain the gravel that was loaded on them.

"8th: Second party agrees upon the signing hereof and [72] as part of this transaction to secure and cause to be delivered a surety bond satisfactory to first part, in due and legal form and in the sum or amount of fifteen thousand dollars, securing to first party and guaranteeing the full and faithful performance of these articles of agreement by second party and the making of the payments and payment of any and all damages by second party herein provided for or stipulated or applied hereunder."

An indemnity bond in the sum of \$15,000 was given, and the American Bonding Company of Baltimore has been made a party to this action also; the bond is in the usual form, with this exception:

"Provided, however, that the surety shall not in any event be liable for the payment of any damage or loss recoverable by policies of insurance insuring said barges against damage or loss by accident or fire."

The purport of that agreement will be taken up in the course of the arguments.

(The articles of agreement are marked Respondent's Exhibit "B" and the bond is marked Respondent's Exhibit "A.")

I understand, gentlemen, that it is stipulated that the value of the barge is \$7,500.

Mr. BELL.—Yes, that is set out in our agreement

and the bond.

Mr. DENMAN.—I mean there is no question about that, about the stipulated value controlling.

Mr. BELL.—For the Napa Gravel & Material Company I will so stipulate.

Mr. RAYMOND.—We make the same stipulation.

Mr. DENMAN.—There was a demand and denial of liability,—a demand on the bonding company and on the Napa Gravel & Material Company—there were two demands made and liability [73] was denied by both parties.

Mr. COOPER.—A demand was made by Bennett & Goodall on the sub-charterers, and also on the bonding company, which liability was denied.

Mr. BELL.—That is stipulated.

Mr. RAYMOND.—That is stipulated.

[Testimony.]

[Testimony of Thomas Crowley, for Respondent.]

THOMAS CROWLEY, called for the respondent, sworn.

Mr. DENMAN.—Q. Mr. Crowley, you were subpoenaed here by the other side, were you?

A. Yes.

Q. What business are you engaged in?

A. Lightering and towing business.

Q. How long have you been engaged in that business? A. 15 years.

Q. Were you the founder of that business in this port? A. Yes, sir.

Q. Just describe generally what you do. How many launches have you now in your plant?

(Testimony of Thomas Crowley.)

A. We have 25.

Q. And lighters? A. We have about 20.

Q. Own any other vessels?

A. Yes, several outside of that.

Q. You have had continuous experience, then, during the last 15 years in the lighterage and towage business in this harbor? A. Yes, sir.

Q. Are you towed by steam tug or in what form?

A. By gasoline.

Q. By gasoline? A. Yes.

Q. And those 25 launches that you refer to now, are gasoline launches? A. All gasoline launches.

Q. Your towage is confined to the Bay of San Francisco and the tributaries thereto?

A. Bay and rivers.

Q. Now, do you recollect being employed by someone to tow this [74] American-Hawaiian barge "Number One" and I think "Number Two" also, in the year 1907? A. Yes, sir.

Q. Who employed you?

A. The Napa Gravel & Material Company.

Q. The Napa Gravel & Material Company?

A. Yes, sir.

Q. And what were you to do?

A. Well, we were to tow on the river, that is, on Napa River, on the upper end.

Q. Did you furnish a launch for that purpose?

A. Yes, sir.

Q. The launch "Pickett"? A. Yes.

Q. Had you known the dimensions and general capacity of barges "Number One" and "Two" of the

(Testimony of Thomas Crowley.)

American-Hawaiian Steamship Company?

A. Oh, yes, I am familiar with that.

Q. Describe the launch "Pickett." What was her power, in the first place?

A. She was 50 horse-power, a three-cylinder standard engine.

Q. What was her condition at that time?

A. She was practically a new boat; she had been built after the fire.

Q. Built after the fire,—that is the fire of 1906?

A. Yes.

Q. Were her engines in good condition?

A. Yes, they were new engines, probably only a year old.

Q. What did you say as to their condition; had you had any trouble with them of any kind?

A. Oh, no; a very good engine; in fact, the boat is still working on the river now.

Q. What is the normal life of a gasoline engine in active launch work? A. I would say 10 years.

Q. And she is still in good condition, is she?

A. Yes.

Q. What can you say as to the power of that launch for the purpose of handling that barge in the upper regions of Napa Creek?

A. Well, I would say that she was capable of handling that barge in that river.

Q. And that is based upon your experience?

Mr. HENGSTLER.—Q. What did you say?

[75]

A. I would say that she was capable of handling

(Testimony of Thomas Crowley.)

that barge in that river.

Mr. DENMAN.—Q. That is based upon your experience as a launch man and towage man in this bay? A. Yes, sir.

Q. Now, can you tell me whether in your experience you have seen larger tows than “No. 1” loaded with gravel towed by launches of that size in river work?

A. Well, on the Sacramento and San Joaquin Rivers nowadays, in fact for years past, the gasoline launches are towing the dredges; the dredges are pretty big vessels, always from 40 to 55 feet wide.

Q. That is larger than this?

A. Yes, but there are different power boats that pull them; but these boats pull pretty big tows on the river at all times.

Q. That is, boats of the size of the “Pickett”?

A. Yes.

Q. Now, who was this man in charge of the “Pickett,” Latimore?

A. Well, he was a young man who had been with us quite a few years.

Q. Handling barges? A. Yes.

Q. What can you say regarding his capacity as a launch man? A. I considered him a good man.

Q. Adequate for that work on the river?

A. Yes, capable.

Q. You say the “Pickett” is now engaged in towing on the Sacramento and San Joaquin Rivers?

A. Yes.

Q. Similar barges to this one? A. Yes.

(Testimony of Thomas Crowley.)

Mr. HENGSTLER.—I object to that, if your Honor please, similar barges to this one. This is a different river and undoubtedly it has different conditions to contend with. I have never seen two rivers that could be said to be similar.

Mr. DENMAN.—I presume that this Court sitting in admiralty can take judicial knowledge of the fact, recognize judicial knowledge of the fact that the Sacramento River is filled with [76] these narrow channels, and that the method of transportation there is similar throughout these narrow bends and cuts.

The COURT.—This witness can testify and describe the work this tug is doing.

Mr. DENMAN.—Q. You were speaking of towage on the Sacramento and San Joaquin Rivers. Those rivers are, in the lower portion of them, spread and divided through Delta islands, are they not?

A. There are dredger cuts and things of that kind.

Q. Dredger cuts and narrow channels between the islands? A. Yes.

Q. Comparable in narrowness—

Mr. HENGSTLER.—I object to this, if your Honor please. I do not ordinarily object to leading questions, but it seems to me that counsel is testifying here instead of the witness.

Mr. DENMAN.—Well, of course it is leading, but the condition of these Delta islands is so well known that it seems fair to present a picture to the witness and ask him if it is true.

The COURT.—Let him describe the conditions. I am entirely familiar with the San Joaquin River.

(Testimony of Thomas Crowley.)

Mr. DENMAN.—How about the channels between these islands in the Sacramento and San Joaquin Rivers as to their width and their crookedness; how do they compare with Napa Creek?

A. Well, they are similar in some places and some places a good deal harder; they are narrow, crooked and all that sort of thing.

Q. You had sent Latimore to Napa Creek before, haven't you. He was familiar with that water there?

A. Oh, yes, he had been with us quite a long time.

The COURT.—Q. The Captain of the "Pickett"?

A. Yes.

Mr. HENGSTLER.—I object to this question, if your Honor [77] please, upon the ground that, in the first place, it is two questions and I do not know which one of the two questions the witness answered. Counsel added on "He was familiar with that water there." How could the witness here know whether any man was familiar with the water of Napa Creek?

Mr. DENMAN.—Q. You had been sending that man to Napa Creek for some time, had you?

A. I had sent him all over, everywhere.

Q. You had sent him to Napa Creek? A. Yes.

Cross-examination.

Mr. HENGSTLER.—Your launches, Mr. Crowley, you say are all gasoline launches, are they?

A. Yes.

Q. You have not had any steam launches, have you? A. No.

Q. Have you any tugs?

A. Gasoline tugs, that is all; no steam tugs.

(Testimony of Thomas Crowley.)

Q. No steam tugs, all gasoline tugs? A. Yes.

Q. What is the power of your gasoline tugs as compared with the power of the gasoline launch that you speak of, the "Pickett"?

A. Well, they are all sizes; we have some smaller than that, and we have some larger than that.

Q. What powers have you?

A. They range all the way from 10 to 100.

Q. From 10 to 100 horse-power? A. Yes.

Q. How many gasoline tugs have you that have a power of 50 and more?

A. Well, the most of them are—well, from 20 up—I have one or two—I have two tens and probably three twenties, and the rest are all from 40 to 50 up.

Q. From 40 to 50 and up? A. Yes.

Q. How many have you above 50 horse-power?

A. About eight.

Q. How many have 50 horse-power?

A. I think about six or seven. [78]

Mr. DENMAN.—Q. You are referring now, to the present time, Captain, are you? A. Yes.

Mr. HENGSTLER.—Q. How many did you have in 1907, in April, or in March, 1907?

A. I could not say definitely. I should imagine we had probably a dozen.

Q. A dozen?

A. A dozen altogether; that is, a dozen launches.

Q. A dozen launches altogether? A. Yes.

Q. How many did you have that had 50 horse-power or more at that time?

A. I should think about four or five.

(Testimony of Thomas Crowley.)

Q. About four or five? A. Yes, sir.

Q. Does the amount of the hire of your launches depend upon their size?

A. Yes; that is, the launch with more power is worth more money.

Q. Worth more money? A. Yes.

Q. Do you remember what the rate of hire of the "Pickett" was in April, 1907, on this occasion when you chartered her to the Napa Gravel & Material Company? A. \$25 a day.

Q. \$25 a day? A. Yes.

Q. She was chartered by the day, was she, or by the job? A. By the day.

Q. At that rate, \$25 a day? A. Yes.

Q. How much would the rate have been in the case of a launch of 100 horse-power? A. At that time?

Q. Yes. A. Oh, probably \$35 or \$40.

Q. Thirty-five or \$40? A. Yes.

Q. And for launches between those two, between 70 and 100, the rate would have been proportionate, would it? A. Yes, around that.

Q. Do you know what the rate of a tug on the bay was at that time, Mr. Crowley?

A. Depending on what size of tug?

Q. A tug, let us say, of 100 horse-power? [79]

A. Oh, a 100 horse-power tug was worth about thirty-five or \$40 a day.

Q. What is the lowest horse-power that any steam tug has that is being used on this bay?

A. About 40.

Q. Were your launches which were used at that

(Testimony of Thomas Crowley.)

time, in April, 1907, actually used in the night-time for navigation?

A. Oh, yes, we work all the time; work night and day.

Q. What kind of lights do they carry in the night-time?

A. Nothing more than the ordinary sidelights.

Q. The ordinary what?

A. Sidelights and headlights.

Q. What kind of lights are those?

A. Oil lights.

Q. How far ahead do they spread light?

A. They do not throw light any distance at all; they are just simply for passing vessels and warning and things of that kind.

Q. Now, you testified that that launch of fifty horse-power was sufficiently powerful to handle the American-Hawaiian lighters?

A. That is, she was sufficiently powerful to handle the American-Hawaiian lighters in Napa Creek.

Q. In Napa Creek? A. Yes.

Q. In all parts of Napa Creek, would you say?

A. Yes, any part of it, all the way down to Vallejo.

Q. How high up would you say would she be sufficient to take that lighter?

A. Well, as high up as she had water to go, or there is sufficient water for the barge to float in.

Q. As high up as the creek was navigable you would say that launch could manage that barge, would you?

A. Well, if you are going up with a light barge you could go up as high as you wanted, but if you go up

(Testimony of Thomas Crowley.)

light you have to have enough water to float that barge coming back again; that depends upon which way you were going up or coming down.

Q. It depends upon whether the barge is loaded, does it not? [80]

A. It depends upon whether loaded or light.

Q. When is she more easily manageable?

A. Light.

Q. You are prepared to say that your launch could guide her light anywhere in Napa Creek, in all those portions of Napa Creek that are navigable, are you?

A. I would say that she was capable of handling the barge either loaded or light in Napa Creek.

Q. Whether light or loaded? A. Yes, sir.

Q. And whether going up or down the creek, would you say? A. Yes.

Q. Up or down the creek? A. Yes.

Q. Would you say that it made any difference whether she was navigated in the night-time or day-time?

A. Naturally it is a little harder work at night than at day.

Q. A little harder? A. Yes.

Q. Is it very much harder to work at night-time than in the day in Napa Creek?

A. Well, anywhere it is harder at night.

Q. Are you familiar with Napa Creek and its different windings and bends?

A. Oh, no, only in a general way.

Q. Only in a general way? A. Yes.

Q. You are really not familiar enough to compare

(Testimony of Thomas Crowley.)

Napa Creek and Sacramento River, are you?

A. Well, yes.

Q. Have you ever navigated on the Sacramento River?

A. Yes, I have been on the Sacramento River a good deal.

Q. I ask you whether you have navigated a boat on the Sacramento River? A. Yes.

Q. What kind of a boat? A. A gasoline boat.

Q. One of your gasoline launches? A. Yes.

Q. Did you ever navigate one of your gasoline launches up in Napa Creek, in the neighborhood that we speak of here?

A. Oh, yes, I have been up there too. [81]

Q. Light or loaded?

A. Light; that is, the boat don't carry a load, she is always light.

Q. What is the purpose of a gasoline launch, what is she built for?

A. Why, she is built for transportation of passengers, freight and towing.

Q. But primarily she is built for the transportation of passengers and light freight, isn't she?

A. Well, when we first started in the gasoline business we built them for the transportation of freight and light towing.

Q. And light towing? A. Yes.

Q. You would admit, wouldn't you, Mr. Crowley, that it is safer to tow a lighter of this sort with a tug than it would be with one of your gasoline launches?

Mr. DENMAN.—Whereabouts?

(Testimony of Thomas Crowley.)

Mr. HENGSTLER.—Q. In Napa Creek?

A. Oh, no, it would not have made much difference.

Q. What is that?

A. It would not have made much difference. It would not have made any difference, as I see. The gasoline engine, when we first used it, years ago—a few years ago, we done very light towing with it, but the engine is built rather heavy nowadays and stands up to a good heavy towing job.

Q. Would you be willing to tow this barge with one of your gasoline launches here on the bay?

A. Well, not with that size launch, not on the bay.

Q. You would need a larger launch, wouldn't you?

A. Oh, yes.

Q. How big a launch would it take for the bay towing of that barge?

A. That would have been a very large barge for a launch to have handled here on the bay; a launch would probably have to have 100 horse-power to handle that here on the bay.

Q. 100 horse-power she would have to have on the bay? A. Yes.

Q. But on the river the launch is sufficient, is it?

[82]

A. Well, it was a fearful tide; he had nothing much to do but just keep the barge straight and she would go down herself.

Q. In other words he did not depend upon your launch for the purpose of towing him down the creek?

(Testimony of Thomas Crowley.)

A. Oh, yes, it would help; it was a help, you know.

Q. The launch would help some?

A. It would tow him down; but all he had to do—the barge would come down itself with the tide; all he had to do was to keep her straight, you know, and she would come down herself.

Q. Suppose the tide were against him and he had attempted to go down at flood-tide, could he have done that?

A. You never tow in a flood tide, that is, with the tide against you, because you would be all day coming down.

Q. Could you do it at all; would your launch be able to do it?

A. No, I do not think we could have towed it down at all on flood-tide.

Q. You don't think it could be done on flood tide at all? A. No.

Q. In other words, in towing down Napa Creek, you know, don't you, Mr. Crowley, that your man who had the "Pickett" relied upon the ebb tide to take him along and not upon your launch alone?

A. Well, we always depend upon the tide in towing; he would have to have power as well, you know, but he would have to have the tide with him; he would have to have a favorable tide and power.

Q. He would have to have a favorable tide?

A. Yes.

Q. When is this barge and launch, this combination, safer,—when she is going or rather, when they

(Testimony of Thomas Crowley.)

are going against the tide or when they are going down with an ebb tide?

A. Well, I don't know as it would make much difference; you don't want to go down too fast with too large a tide, just slowly down, slow with slack water, have just a slow tide with him, that [83] would probably be the safest time for him.

Q. The more rapidly the ebb tide is the more danger it is, is it not?

A. He would go down too fast, and that is all.

Q. He must not go down too fast?

A. Because the boat going down too fast is likely to take a sheer and go ashore.

Q. Your launch could not retard the motion of the barge in that case?

A. No; he was towing with a headline.

Q. All the launch could do is pull it off the bank?

A. Yes, zig-zag down.

Q. Do you know what the launch "Pickett" is now doing in the Sacramento River?

A. She is towing.

Q. She does not belong to you? A. No.

Q. To whom does she belong?

A. She belongs to Bloomfield, of Antioch.

Q. Did you sell her? A. Yes.

Q. How long ago?

A. About three years, I think.

Q. About three years ago. You have not had anything to do with her during those three years?

A. No.

Q. You don't know what exactly she is do-

(Testimony of Thomas Crowley.)

ing in the Sacramento River, do you; have you seen her recently? A. Yes.

Q. When did you last see her?

A. Well, she came into my wharf just a short time ago; every time she needs anything, she comes down.

Q. You actually know what she is doing in the Sacramento River and what she has been doing the last three years?

A. Off and on as I have seen her towing ships.

Q. You have seen her towing ships? A. Yes.

Q. Where?

A. Around Antioch—around the river.

Q. How wide is the river near Antioch?

A. Oh, it is a wide river; that is, it is from Antioch over to Jersey Island, probably half a mile.

Q. Half a mile wide? A. Yes. [84]

Q. You have sent this man Latimore up to Napa Creek you say, on jobs frequently, several times, before April, 1907?

A. He had been in my employ eight or nine years, I think, and I had sent him to a number of—in fact, to other places on the river and bay.

Q. Had he ever been there with a lighter before?

A. He had been there with a Standard Oil lighter, I think.

Q. You are not sure about that, are you, Mr. Crowley?

A. Well, we tow on the river, and I had him on a job there towing, that is, towing the Standard Oil barge for a long time, and we went to all these different places in there; and in fact whenever a job

(Testimony of Thomas Crowley.)

came up, any job at all, why, we would send him anywhere.

Q. Do you know whether he had ever been with a lighter above the railroad bridge on Napa Creek?

A. Oh, yes.

Q. Are you positive about that?

A. You mean what we call the Napa drawbridge?

Q. Yes, the Napa drawbridge? A. Yes.

Q. You are positive that he has been there with a lighter before? A. Oh, yes.

Q. Going up with a lighter in tow, or down?

A. Why, going both ways; he has gone right to Napa.

Q. Gone right to Napa? A. Yes.

Q. And you are positive that he has come back to Napa with a lighter in tow, with one of these launches, are you? A. Yes.

Q. What lighter was that?

A. Oh, I mean different lighters; I could not tell you any particular lighter that he has gone on. I know of half a dozen jobs that I sent him in there with.

Q. So when he said in his deposition which was read a little while ago that he had never been around Horseshoe Bend, he did not tell the truth, did he?

[85]

Mr. DENMAN.—With these lighters?

Mr. COOPER.—With these particular barges?

Mr. HENGSTLER.—Q. With the lighters?

A. I don't know anything about what he said, but he had been there before.

(Testimony of Thomas Crowley.)

Q. What is that?

A. I don't know what he said, but he had been there before.

Q. He had been there before, around Horseshoe Bend?

A. He had gone right in with a boat or with a launch right up to Napa.

Q. Do you know whether he then had a tow?

A. Well, I could not say what he had. As I say, he towed barges and schooners and all that sort of thing around, and I know positively he has been in to Napa because I have sent him in to Napa. Previous to that time I think we towed a couple of small barges up there for another gravel company.

Q. Who did that?

A. I do not know whether he did, but I know our company had been towing some.

Q. I don't care what your company did, as long as you don't know that either. You said that Mr. Bell hired the launch from you at the time in March or April, 1907?

A. Either Mr. Bell or Mr. Powers, I forget which.

Q. The Napa Gravel Company,—one of the officers of the Napa Gravel Company? A. Yes.

Q. Either Mr. Bell or another officer of the company? A. Yes.

Q. Did he then tell you that your launch would have to tow one of the American-Hawaiian barges up Napa Creek?

A. Well, I understood that, or it seems—my recollection of it was that the boat was to go up there

(Testimony of Thomas Crowley.)

to tow barges from Napa Creek down to the tug-boats. [86]

Q. From Napa Creek? A. Yes.

Q. He did not tell you what barges, did he, what particular barges?

A. Well, I knew what barges; I knew that the "Energy" was there, and I knew that the barge "Energy" was there, and I knew that they had these barges.

Q. Did you know that they had the American-Hawaiian barges? A. Yes.

Q. But you did not know whether it was the American-Hawaiian barge or the barge that you mentioned just now—he did not tell you which one was to be towed? A. No.

Q. Didn't you tell Mr. Bell or whoever engaged you, that you did not think that your launch was powerful enough to handle or manage the American-Hawaiian lighters—didn't you tell him that?

A. No, not that I know of.

Q. Are you sure about that, Mr. Crowley?

A. As far as I remember.

Q. Didn't you recommend to him to take a more powerful launch?

A. No, not that I know of. No, I did not.

Q. You are not sure about that, are you?

A. Well, it is five years ago, but I don't see why I should say that to him at that time.

Q. If you knew what she was to do you would know what she was capable of doing, and if you thought she was not capable to do that work, you

(Testimony of Thomas Crowley.)

would call his attention to it, wouldn't you?

A. Well, I would soon hear from him if she was not capable of doing it.

Q. What is that?

A. I would have soon heard from him if she could not do the work.

Q. Did this man Latimore ever complain to you that the launch was not powerful enough to do the work up there?

A. No. In fact, he was only there about 5 or 6 days, wasn't he?

Q. What is that?

A. No. I know he complained about his [87] accommodations and about the work he had to do; that was about all he ever said; in fact, I never kept in touch with him, but once I think I went up there a few days before the accident happened to see how he was getting along.

Q. And didn't he then—

A. (Intg.) His objection then was that he was working too hard; the job was too hard for him.

Q. Did he not say that the job was dangerous and too dangerous for him?

A. No, not that I know of.

Q. Do you know of your own knowledge whether or not he asked for another man to accompany him in the launch, upon the ground that he was afraid to take that job alone?

A. Well, he would have to get the man from the Napa Gravel Company; he could not get the man from me because all we hired was just himself, the

(Testimony of Thomas Crowley.)

fuel and the boat.

Q. So that you did not—

A. (Intg.) I referred him, if he wanted anything or wanted to get anything or had any kick coming, he would have to take it up with these people.

Q. You did not supply the extra man he had in the launch? A. No.

Redirect Examination.

Mr. DENMAN.—Q. Mr. Crowley, **why would** you require more power to handle the lighter in the bay than on Napa Creek?

A. Well, on the bay we have strong tides and have to pull that lighter across the tide, and we have strong winds; those elements would be too much.

Q. What is the practice in towing in these tidal currents with regard to availing yourself of the tide? A. How is that?

Q. What is the practice in towing in these tidal currents with regard to availing yourself of the tides? [88]

A. Well, we always work with the tide; we never pull against the tide.

Q. It is practically tidal towage, isn't it?

A. Yes, always.

Q. Now, what was this barge "Energy"; did you know her? A. Yes.

Q. Is she a larger or smaller barge than these barges?

(Testimony of Thomas Crowley.)

A. Why, she is a different shaped barge; she is a big barge, though.

Q. Do you know whether she is larger or smaller?

A. I think she is a larger barge.

Q. So that the barges that you knew of at the time that you chartered this launch were these two American-Hawaiian barges and the "Energy" which was larger than the American-Hawaiian barges; that is correct, is it? A. Yes.

Q. Did this launch ever handle the "Energy" on Napa Creek?

A. Yes; he made a tow down with her; he towed her down from Napa to the Mail Dock.

Q. From Napa to the Mail Dock? A. Yes.

Mr. DENMAN.—Mr. Bell, do you want to put any questions?

Mr. BELL.—Yes.

Q. You have stated, Mr. Crowley, that you either made these arrangements with myself, representing the Napa Gravel & Material Company, or with Mr. George Powers?

A. I believe it was—no, I think there was a third party, come to think of it. I *there* there was another manager, one of the officers, anyhow, of the Napa Gravel,—I forget whether it was Mr. Powers, you or another gentleman.

Q. Do you remember my being there and taking up the matter with you and concluding the arrangements? A. No, I could not say that I do.

Q. Well, now, you knew at that time, did you not, that I was [89] not a steamboat man nor

(Testimony of Thomas Crowley.)

engaged in that line of business at all, that I was practicing law at Napa? A. Yes, sir.

Q. And did you know also that Mr. Powers was not a steamboat man, or not in that business, but engaged in farming at Napa?

A. No, I thought Mr. Powers was familiar as well as—what is the name of the other gentleman?

Q. In the company at that time?

A. The manager.

Q. Mr. Jackson? A. I don't know.

Q. Mr. Steinn?

A. There was some other gentleman besides.

Q. Dailey?

A. There was some other gentleman, besides Mr. Powers.

Q. Well, we may recall his name later. Now, you knew at that time that our company had made arrangements with Goodall & Bennett for these barges to carry gravel out of Napa River to San Francisco, did you not? A. Yes.

Q. You had been familiar for some time with these barges, with their character and generally the capacity? A. Well, I had seen the barges, yes.

Q. Were they not tied very close to your place of business about that time?

A. No. They were very near one of our stations.

Q. You knew that we were in the gravel and material business and desired to bring this gravel out of Napa River to San Francisco? A. Yes, sir.

Q. And we came to you for the purpose of having you supply a towboat to go up into the upper

(Testimony of Thomas Crowley.)

reaches of the river to bring out those barges?

A. You came to hire a launch.

Q. You have no recollection, have you, that any of us picked out this particular launch "Pickett"?

A. No.

Q. Do you not recall that the matter was left to your judgment as to what kind of a boat and what power should be supplied?

A. It was not left to my judgment. You told me about what [90] kind of a boat you wanted.

Q. We told you it was the kind of job that we wanted you to do? A. Yes.

Q. The nature of our business, and you knew the barges that we were intending to use? A. Yes.

Q. And we then arranged financially for the hiring of this launch you were to supply, and you were to supply the Captain and Engineer and fuel?

A. Yes.

Q. As I understood you to say that knowing all these circumstances that you did supply to us one of your launches that you believed capable of doing the work, and a man capable of handling that launch and doing the work? A. Yes.

Q. And sent him to Napa River to do the work?

A. Yes.

Q. That barge "Energy" that you mentioned, that was not one of those two barges, was it?

A. No.

Q. Was it not a larger barge than the barge "No. One" that was wrecked in the river?

A. Yes, she carried more.

(Testimony of Thomas Crowley.)

Q. She carried more?

A. And larger in dimensions.

Q. And prior to this time you had detailed Latimore to bring the barge "Energy" down from Napa?

A. I did not detail him; he was up there; he towed it down; he was up there taking orders.

Q. But not for the Napa Gravel & Material Company. He did not tow the "Energy" for the Napa Gravel & Material Company? A. I believe so.

Q. Was it not for a Mr. Durfee—do you know Mr. B. F. Durfee? A. Yes.

Q. Was it not for him?

A. Well, I think Mr. Durfee represented the Napa Gravel Company.

Q. But this "Energy" was towed by Latimore and this launch "Pickett," were they not?

A. Yes.

Recross-examination.

Mr. HENGSTLER.—Q. With reference to this towage of the [91] barge "Energy," Mr. Crowley, to whom does that barge belong?

A. It belongs to Captain Bennett, or Bennett & Goodall.

Q. Do you know her dimensions?

A. I think she is about 135 or 140 feet long, and about 36 feet wide, and 14 feet in depth; she has about a 14-foot side.

Q. Don't you know that the American-Hawaiian lighter is 38 feet wide?

A. Well, this barge has a depth—the American-

(Testimony of Thomas Crowley.)

Hawaiian barge was a shallower barge; this barge is deeper.

Q. That is why you say she is larger in dimensions, because she is deeper?

A. Yes, she has got a higher side.

Q. How deep is the "Energy"?

A. I say the "Energy" has a 14-foot side.

Q. A 14-foot side? A. Yes.

Q. That means from the deck?

A. To the bottom.

Q. To the bottom? A. Yes.

Q. She is substantially a square box also, isn't she, but her height is 14 feet? A. Yes.

Q. How high is the American-Hawaiian barge?

A. Well, I think they were about 11 or 12 feet—seven feet I guess, about 7 feet.

Q. Now, when was the "Energy" towed down by the "Pickett," before or after the time when the lighter "No. One" was towed down? A. Before.

Q. Before; you are sure about that?

A. Yes, because he never towed any other barge after they had the accident.

Q. If he says that he had never been higher than the point A before, he was then mistaken?

A. Well, I mean he had been there with his launch; I don't know what he testified to, but I mean that he had been with his launch up that river; he many times would go on a job without a tow, run up there light, you understand; now, he had probably been to Napa time and time again

(Testimony of Thomas Crowley.)

without a tow; he [92] had been right up to the wharf.

Q. That is all you mean, he had been up there; you don't know whether he was with a tow or not?

A. No, I did not say that; I know he has been there, not with a tow.

Q. I think you gave the impression that he had been there with a tow before? A. Oh, no.

Q. He had been there once, as far as you know, light?

A. Oh, yes, he has been with his launch—with the launch.

Q. When your launch was engaged, you did not know the exact spot where he would have to take the launch with the load, did you?

A. No, sir. I knew that he was in Napa River, and that is all.

Q. Somewhere in Napa River, but did not know how high up he was going? A. No.

Further Redirect Examination.

Mr. DENMAN.—Q. Come over here, Captain, and look at this chart, will you please? With reference to the power of the launch, I will ask you whether there is any greater difficulty in towing above that point here until she was around up to say the point marked "T," than there is in towing from a point between "B" and "Z" down through these winds and arms?

A. From here to where (pointing)?

Q. From "T" to a point marked "Z," is there

(Testimony of Thomas Crowley.)

any difference in the difficulty of towing between "T" and "Z," and say down the river to a point marked "Y"—what is this conspicuous difference?

A. This would be the hardest tow, from here down (indicating).

Mr. HENGSTLER.—Q. From "T" to "Z"?

A. Yes.

Mr. DENMAN.—Q. Is there anything unusual about that tow that makes it conspicuous?

A. Only the channel being cut and narrow—there is no material difference to speak of.

Q. Have you been over these waters yourself?

A. Yes. [93]

Q. Familiar with them? A. Yes.

Q. Is there anything in that reach from "T" to "Z" that presents anything extraordinary or unusual for a launch of that size to encounter?

A. Oh, no—I don't quite understand what you mean.

Q. I mean, is there anything in that reach between "T" and "Z" that would make you hesitate to send your launch in there?

A. There is a bend here.

Q. There are lots of bends; are they different from the bends elsewhere?

A. No. For instance, here, you have a little bigger bend, a little more water.

Q. Let me ask you again as to the water in here, is there anything in this that would make you hesitate to send your launches there? A. Oh, no.

(Testimony of Thomas Crowley.)

Q. Now, how many times have you been over Napa Creek?

A. Oh, I could not say, a number of times.

Q. Ten? A. Oh, yes.

Q. Do you recollect what the breadth of the stream is between "A" and "X"?

A. No, I don't know that; I can't tell from that. I would say probably two to 300 feet, around that.

Q. Is it 400 feet, as far as you recall?

A. Well, there is a possibility that it might be, say from 200 to 400.

Q. But there is nothing in between "T" and "Z" that would make you hesitate to send that launch of yours to take care of that barge in that creek?

A. No, there is not—not with good water in the creek.

Further Recross-examination.

Mr. HENGSTLER.—Q. Have you ever made that distance from "T" to "Z" with your launch and a lighter in tow as large as an American-Hawaiian lighter? A. No.

Q. You have never had that experience?

A. No. [94]

Q. Have you ever taken any lighter over that stretch in tow of your launch, the "Pickett" or any other of your launches?

A. No, not that I know of.

Q. You have no experience in towing over that particular spot?

A. Not over that particular spot.

(Testimony of Thomas Crowley.)

Q. Nor have you any experience, Mr. Crowley in towing from "Z" to "Y"?

A. No; I have run over it light, that is all.

Q. You know the comparative danger with a light launch, but you don't know anything about the comparative danger with a launch that has got a heavy tow, a heavily loaded tow, do you?

A. Well, it is a little harder job,—a little harder.

Further Redirect Examination.

Mr. DENMAN.—Q. There is nothing in there that you as a launchman cannot estimate as you go through light? A. No.

Q. You can tell exactly what would happen to you with a heavy tow if you go through light?

A. Yes.

Q. There is nothing there that is unusual in the towage conditions of the tributaries of the bay, is there? A. You mean on the river?

Q. Yes.

A. That is no different than other bends on the river, though.

Further Recross-examination.

Mr. HENGSTLER.—Q. Have you ever been over this stretch from "T" to "Z" and from "Z" to "Y" in the night-time, on a very dark night?

A. No.

Q. With your launch light? A. No.

Q. Never have? A. No.

Further Redirect Examination.

Mr. DENMAN.—Q. Now, Captain, you knew all

(Testimony of Thomas Crowley.)

these facts about Napa Creek when you sent the launch there, you had been up there before?

A. Yes.

Q. So it was with that knowledge in mind and those conditions [95] of mind that you picked this launch for that service? A. Yes.

(A recess was here taken until 2 P. M.)

AFTERNOON SESSION.

[**Testimony of William J. Fisher, for Respondent.**]

WILLIAM J. FISHER, called for the respondent, sworn.

Mr. DENMAN.—Q. What is your occupation?

A. I am operating a gasoline towboat on the bay and rivers.

Q. How long have you operated gasoline towboats? A. About nine years.

Q. How long have gasoline towboats been used for towage purposes on this bay, and the vicinity?

A. I could not say that. I have been out here about 13 years, and I saw some in operation then—small ones.

Q. Have you ever operated a gasoline launch on Napa Creek? A. Yes, sir.

Q. For how long a time?

A. Three years, the first of March.

Q. The first of March? A. Yes, sir.

Q. Have you been steadily engaged in operating gasoline launches there?

A. No, sir, we operate there most of the time, but during times we go up to Rio Vista.

(Testimony of William J. Fisher.)

Q. Do you go up to Montezuma Slough sometimes?

A. We have been around Montezuma Slough, and we also operate in Sonoma Creek.

Q. But principally on Napa Creek?

A. Principally on Napa Creek.

Q. Between Napa and San Francisco?

A. Yes, sir.

Q. What is the name of your launch?

A. The "Imperial."

Q. What is her horse-power? A. 50.

Q. Do you recollect the launch "Pickett"?

A. Yes, sir. [96]

Q. What can you say about the two launches? Are they about the same?

A. About the same; if anything, he has more power.

Q. If anything, he has more power than you?

A. Yes, sir.

Q. What are you doing—carrying or towing?

A. Towing.

Q. Towing what?

A. Barges of ground rock and sand.

Q. Have you various sizes of barges that you tow? A. Yes, sir.

Q. What is the largest?

A. The largest we are using carries about 350 yards of gravel.

Q. Do you remember the barges that the "Pickett" towed up there?

A. That was before I went up there.

(Testimony of William J. Fisher.)

Q. Have you ever seen those barges?

A. Yes, sir, I saw them at a distance—I never was very close to them.

Q. How do they compare in size to the one you tow there—the largest of them?

A. The largest we tow is 37 by 130, and 7-foot *size*.

Q. Is there any difficulty in handling barges up and down that creek with a 50 horse-power launch?

A. No, sir.

Q. How many times do you suppose you have come up and down there?

A. I could not tell you unless I have the log-book to look at. We come quite often, sometimes every day, and sometimes every third day.

Q. Fifty times? A. Yes, sir.

Q. One hundred?

A. I guess about a hundred times.

Q. This largest barge that you speak of, how far have you towed that down the creek?

A. Down to San Francisco.

Q. Down to San Francisco? A. All the way.

Q. This 50 horse-power launch, which you think had less power than the "Pickett," you have towed from Napa City?

A. No, sir, not from Napa City, just above the Horseshoe Bend. I should judge half a mile above there—the largest barge.

Q. Half a mile above Horseshoe Bend?

A. Yes, sir.

Q. To San Francisco? A. Yes, sir. [97]

(Testimony of William J. Fisher.)

Q. Have you done that more than once?

A. Yes, sir.

Q. How have you taken the bay? In all weathers?

A. We would always watch for the best tide. The wind did not bother us any. It was the tide.

Q. So that you could handle, in spite of the winds on the bay, a barge of that size with your 50 horsepower launch? A. Yes, sir.

Q. How long is the trip down the bay after you leave Napa City?

A. The time it takes to come down?

Q. How many miles is it?

A. After we leave Napa Creek—I don't know just the exact number of miles—I should judge from the bridge down it must be about 35.

Q. About 35 miles of bay travel?

A. From Vallejo down it is about 30.

Q. 30 miles? A. Yes, sir.

Q. You are able to handle barges of that size with that power of launch? A. Yes, sir.

Q. Did you ever have any difficulty in making your turns in the creek there? A. No, sir.

Q. How do you utilize the tide in bringing the barges down?

A. We leave up there about high water at the heads down here. That gives us a start of two hours on the tide before the tide is high up there in Napa Creek.

Q. It takes two hours for the high water in the heads at San Francisco to reach up at Napa Creek?

(Testimony of William J. Fisher.)

A. Yes, sir.

Q. You start at about high water at the heads?

A. Yes, sir.

Q. What is the purpose of that? Why do you want to have a little rising water in the creek?

A. In case of going over the Rocky Reach. That is what they call the Horseshoe Bend. We want to get over the rocks before the tide starts to fall.

Q. Which side of the river is that Rocky Reach on? [98] A. It extends most of the way across.

Q. Which way do you pass? On the starboard side? A. On the starboard side.

Q. It runs out to the *point* side of the stream coming down? A. Yes, sir.

Q. You pass it on the starboard side of the stream? A. Yes, sir.

Q. After you pass it you have to straighten up into the stream again, don't you? A. After, yes.

Q. How far is that from the Bend—from the Rocky Reach?

A. As soon as we pass the rocks we start pulling to starboard to come round down the Bend.

Q. That is the route that you have taken so many times with this 50 horse-power launch?

A. Yes, sir.

Q. How about the night travel?

A. It is mostly through the night.

Q. You take the tides as you find them?

A. Yes, sir.

Q. The barges are loading during the daytime?

A. Yes, sir, we take them up during the night;

(Testimony of William J. Fisher.)

they load them the next day, and we bring them down in the night.

Q. Do you regard the navigation of the creek as any more difficult above the Bend than below?

A. No, sir.

Q. Have you used this same launch during all these three years that you have been up there?

A. Yes, sir.

Q. You used that on those other creeks also that you referred to? A. Yes, sir.

Q. How does Napa Creek compare with Sonoma Creek for difficulty of handling?

A. Sonoma Creek is worse than Napa Creek. The channel is narrower, and there is not so much water.

Q. Have you ever been up to Delta Island in the San Joaquin?

A. I have been up as far as Rio Vista.

Q. Never worked there?

A. No, sir, only towed some dredger [99] spuds up to a dredger.

Q. That is not towing?

A. Yes, sir, towing because the spuds are to hold the dredger in place while it is working.

Q. I thought you had reference to the article of food? A. No, sir.

Q. How do those dredgers move about in those creeks? A. Generally with gasoline launches.

Q. Of the size of your launch?

A. Some smaller, and some larger.

Q. Is your launch of adequate power to handle those dredgers?

(Testimony of William J. Fisher.)

A. Yes, sir, providing the tide is in our favor.

Q. I mean with a proper tide? A. Yes, sir.

Q. Have you an assistant on your launch?

A. No, sir.

Q. Does the law require you on a launch of your size to have one?

A. No, sir, not for towing purposes.

Q. So you do it yourself? A. Yes, sir.

Q. Have you a man on the barge also?

A. Yes, sir.

Q. And a man on the launch? A. Yes, sir.

Q. So that you are able to handle the towing lines from both ends? A. Yes, sir.

Q. Is there any difficulty in having a small launch to tow with in a winding stream?

A. Yes, sir, providing the water is shoal, with a small boat you can pull more at right angles across the end of the barge to bring it straight in the stream.

Q. With a light draft you have a lighter power necessarily than with a heavy draft?

A. Yes, sir.

Q. Your idea is then you can control the barge better coming round the turns than with a larger vessel? A. Yes, sir, in shoal water.

Q. Is that the reason they are used throughout these smaller streams? A. Yes, sir.

Q. What is the customary power used for handling gravel barges [100] in Napa and Sonoma Creeks? A. Mostly gasoline.

Q. Gasoline launches? A. Gasoline launches.

(Testimony of William J. Fisher.)

Q. Are there any considerable number of steam tugs engaged in that business?

A. I believe there are two, the "Fox" belonging to the Bay Development Company, and the "Valient" belonging to Rhodes Jameson & Company.

Q. The bulk is done by launches? A. Yes, sir.

Q. How many of them are there, do you suppose, engaged in that business?

A. The "Elsie" belonging to Mr. Nelson.

Q. Half a dozen?

A. I could not tell you the number altogether. I guess there is about half a dozen.

Q. You were speaking about bringing your vessel down to San Francisco. Are all your trips through from Napa to San Francisco?

A. No, sir, when I went up first all I had to do was to come to Vallejo, and I would meet the tug there. The tug would take the loaded barge from Vallejo down to San Francisco, and I would take the light barge from there up.

Q. How is it now?

A. I go all the way through.

Q. How long have you been doing that?

A. I guess about the first three months I was up there the tug met me. After that it was all the way.

Q. Nearly three years?

A. About two years and a half.

Q. Have you ever encountered any difficulty in handling barges of that size with your launch on the bay? A. No, sir.

(Testimony of William J. Fisher.)

Cross-examination.

Mr. HENGSTLER.—Are you working for yourself, or for anybody else?

A. I am working for the Bay Development Company.

Q. For the Bay Development Company?

A. Yes, sir.

Q. How long have you been working for them?

A. Three years the first of March. [101]

Q. Do you know if the Bay Development Company is the successor of the Napa Gravel Company?

A. No, sir, I could not tell you anything about that.

Q. You are running a launch for the Bay Development Company, are you?

A. The launch belongs to me. It belongs to me, it is my own property. They have her chartered by the month like. I own the launch myself.

Q. You own the launch yourself and charter her by the month to the Bay Development Company?

A. Yes, sir.

Q. How much is the charter hire?

A. \$250, and everything found.

Q. \$250 a month. That includes your labor?

A. Yes, sir.

Q. Now, how long have you been running that launch for them?

A. It will be three years the first of March.

Q. How long have you been running it in Napa Creek?

A. That is the first time I started with them.

(Testimony of William J. Fisher.)

Q. The first trip?

A. The first trip was the first of March three years ago.

Q. How long did that continue?

A. Well, the last trip I brought a barge down was last Saturday.

Q. So that during all these three years you were running that launch for them and always in Napa Creek?

A. No, sir, in Napa, Sonoma and Sacramento Rivers.

Q. How often in Napa Creek?

A. I could not say just the exact number of trips unless I looked over the log-book.

Q. About what is the number of trips?

Mr. DENMAN.—He said over a 100.

A. I should think over a 100 any way.

Mr. HENGSTLER.—Q. During that time have you been towing various lighters? A. Yes, sir.

Q. To whom do those lighters belong, do you know?

A. They all belong to the same company. [102]

Q. To the Bay Development Company?

A. Yes, sir, that is they have them chartered. When I went there first they had one chartered from one of these other firms, I believe. They called it "F 6."

Q. What is the size of the lighters that you usually tow? The same size or various sizes?

A. No, sir, the one I took up last was 30 by 100;

(Testimony of William J. Fisher.)

the one I brought down was 30 by 110. The largest is 37 by 130.

Q. The largest is 37 by 130?

A. Yes, sir. The smallest is 28 by 80.

Q. How often did you tow that large one?

A. I could not say how often we were up Napa Creek with the largest one. They generally sent that for rock. I suppose we would be up Napa Creek a dozen times.

Q. You yourself were up a dozen times with this barge?

A. Yes, sir, that is about that. I could not say the exact number of times unless I looked it up in the log.

Q. How high up were you with that barge in the creek?

A. I should judge half a mile below the Asylum wharf, or perhaps a little more.

Q. Half a mile below the Asylum wharf?

A. Yes, sir.

Q. Did you pick up the barge half a mile below the Asylum wharf every time you towed her down?

A. No, sir, just where we got the best gravel, the best pumping. Sometimes we would be further up and sometimes lower down.

Q. Did you ever pick it any higher up than the Asylum wharf?

A. Not until lately. The last trip it was a quarter of a mile above the Asylum wharf, last Saturday.

Q. You have been towing there for the last three years?

(Testimony of William J. Fisher.)

A. Yes, sir, three years the coming March.

Q. You did not do any towing in April, 1907?

A. No, sir, not up that way. [103]

Q. You know, do you not Mr. Fisher, that Napa Creek has been dredged in various places since that time, since April, 1907? A. Yes, sir.

Q. And it is still being dredged in various places, is it not? A. I believe it is.

Q. And you know, don't you, that the place called Lone Tree Bend has been dredged since 1907?

A. Yes, sir.

Q. Now, what did you say about the launch "Imperial"? A. The launch "Imperial"?

Q. Yes. A. It is rated 50 horse-power.

Q. What did you say about her. Did you say that you own her? A. I own her myself.

Q. That is the one you speak of that as you own yourself? A. Yes, sir.

Q. Have you ever navigated any tugboats?

A. No, sir, not steam.

Q. What were you doing before you ran this launch for the Bay Development Company?

A. I was working down on the bay where they were reclaiming the land at Dumbarton Point and Alviso City.

Q. Had you any experience before that in running launches? A. Yes, sir.

Q. Where? A. Around the bay and rivers.

Q. Do you know what the load was of the largest one of the barges that you towed during the time that you mentioned?

(Testimony of William J. Fisher.)

A. Well, the "Colorado" was 30 by 110, 350 yards is what they claim was on her, but they claim they had more on her at times, but 350 is supposed to be her load.

Q. Her maximum load?

A. Yes, sir. Her average load at all times would be 330.

Q. You never towed any barge with any larger load than that on, did you?

A. No, sir, that is about the largest. [104]

Q. That is the largest? A. Yes, sir.

Q. You never had any difficulty with any of these barges at the curves and bends of Napa Creek?

A. No, sir. Not excepting when they were dredging out that bend. When they were dredging out the bend we did not have room enough to get by, and had to stop for the next tide—the next high tide.

Q. That is when they were dredging out?

A. Yes, sir.

Q. What bend was that? A. Horseshoe Bend.

Q. Do you know what is called the Lone Tree Bend?

A. That is the Lone Tree Bend. Some call it Horseshoe Bend and some call it Lone Tree Bend.

Q. You are speaking of the Lone Tree Bend when you speak of the Horseshoe Bend reef that is running out towards the point? A. Yes, sir.

Q. What difficulty did you have at that point when that place was being dredged out?

A. We did not have space enough to go by. We hung up on the bank alongside of the dredge, astern

(Testimony of William J. Fisher.)

of the dredge. We did not have space to go by.

Q. Then, you waited until the dredge was out of the way? A. Yes, sir.

Q. And then, went by after that?

A. Yes, sir, we had no trouble at all as long as there was nothing in the way.

Q. You stated, I believe, that part of this time you towed the barges down to Vallejo and part of the time you towed them all the way to San Francisco?

A. Yes, sir.

Q. What portion of the time did you tow them all the way to San Francisco?

A. I should judge, I guess we were there about three or four months. After that I started towing them all the way through. I could not tell you the exact time unless I had the log-book. [105]

Q. I do not care about the exact time. I want to know during what portion of the three years you speak of did you tow the barges all the way to San Francisco?

A. That is the last part of it. The first part of it I stayed up in the creek, the first three months.

Q. The first three months you only towed them to Vallejo? A. Yes, sir.

Q. And after that you towed them all the way to San Francisco?

A. Yes, sir, San Francisco or Oakland, or wherever the barge load was going.

Q. Did any of the barges that you towed have any steering apparatus? A. No, sir.

Q. None of them had any steering apparatus?

(Testimony of William J. Fisher.)

A. No, sir.

Q. They had no rudder on? A. No, sir.

Q. No locomotive power? A. No, sir.

Q. What are they, barges or lighters?

A. Lighters.

Q. What is the difference between a barge and a lighter?

A. A barge has steering gear on, while a lighter has not.

Q. None of them had any deck-house, did they?

A. There is a house on the barge for the man to live on. The bargeman lives on the barge.

Q. Is that so with all the barges?

A. That is so with the large ones; three large ones.

Q. Do you know whether "Lighter No. 1" of the American-Hawaiian Company had any house on deck? A. I could not say.

Q. Do you know this "Lighter No. 1" of the American-Hawaiian Steamship Company? Did you know it?

A. I could not say. I do not know one from the other. I passed them a couple of times over in Oakland Creek. I could not tell which was which.

Q. You could not tell what their carrying capacity was? A. No, sir. [106]

Q. Nor as to their size? A. No, sir.

Q. Has the weight of the load anything to do with the difficulty in towing the barge?

A. Well, it makes it a little harder to handle.

Q. Makes it harder. The more weight on the barge the harder it is to handle it? A. Yes, sir.

(Testimony of William J. Fisher.)

Q. Do the curves in the creek present any difficulty which is not present on the straight stretch?

A. Yes, sir; it is a little harder to come around the bend than it is on a straight stretch.

Q. What difference does the ebb tide make in rounding a point on a curve, in the difficulty of man-aging the barge?

A. Well, if you do not watch in coming around the turn it will set you more over to the shore; if you watch coming round the bend and get your barge swinging the proper way then there is no difficulty at all.

Q. You have to be very careful in going around the bend?

A. I go around the bend at the same rate of speed as going ahead. I go full speed.

Q. You go ahead full speed around the bend?

A. Yes, sir.

Q. You always do so?

A. Yes, sir; that is since the reef was dredged out. Before the reef was dredged out we had to be more careful in going over the reef.

Q. You had to be more careful at that time than you do at the present time? A. Yes, sir.

Q. At the present time there is no difficulty at all?

A. No, sir.

Q. Does it make any difference in rounding the curve how the ebb runs, as to whether it is at the early stage of the receding [107] tide or a late stage of the ebb tide? Does that make any difference?

A. That does not make very much difference after

(Testimony of William J. Fisher.)

the tide starts running. After the tide starts running the current is just about the same until it slacks up again.

Q. Has the rapidity of the receding ebb anything to do with the difficulty in rounding the point?

A. Yes, sir; the stronger the tide runs the more careful you have to be in coming around the bend.

Q. And if it is a rapidly falling tide it is far more dangerous than it is near the high-water mark when the tide falls slower, is it not?

A. In some cases where it runs *aground* and the tide is falling very rapidly you stand a chance of not getting off so easily; the tide falls away from the barge too rapidly; it leaves the whole weight of the load on the barge.

Q. What kind of a bank is it around there, soft or hard? A. A hard bank.

Q. Do you know how the banks of the Sacramento River are?

A. I could not tell you very much about them.

Q. Do you know about this Sonoma end?

A. Sonoma Creek?

Q. Yes. A. Yes, sir.

Q. Are the banks hard or soft?

A. Hard most of the way. It is hard until you get out through the bridge. From there out it is a pretty steep bank like on the side, until you get out to the mouth of the creek, then there are mud flats on both sides.

Q. How does that influence the difficulty of navigation, the fact that it is a hard or soft bank?

(Testimony of William J. Fisher.)

A. I don't see very much difference.

Q. Is it not a hard spot to negotiate, if the banks are hard? [108]

A. If you get on a hard bank on a falling tide you are liable to stay there until the next tide. With a soft mud bank you have more chance to pull the barge off.

Q. You have towed barges down this Napa Creek in the night-time?

A. Yes, sir; most of our tows are in the night-time down the creek.

Q. Have you never picked up a barge above this Horseshoe Bend? A. Horseshoe Bend?

Q. Or Lone Tree Bend, and taken her down in the night-time? A. Yes, sir.

Q. Have you ever passed Lone Tree Bend late at night?

A. Yes, sir; pretty nearly at all times of the night.

Q. At all times of the night? A. Yes, sir.

Q. In your launch?

A. Yes, sir. It would depend on high water at night; just before high water we get over the rocks, we leave at high water at the Heads to get over the rocks before high water there.

Q. You make it a point to get over the rocks at Lone Tree Bend before high water? A. Yes, sir.

Q. It would be much more dangerous to get through on the ebb tide in that place?

A. Yes, sir.

Q. You would consider it a very dangerous place if

(Testimony of William J. Fisher.)

you got caught there while the ebb is running rapidly, wouldn't you?

A. Yes, sir. If it is running very strong and the tide is going down rapidly and you get caught there; at that time before the reef was taken out it was dangerous.

Mr. DENMAN.—Are you referring to being caught on the reef or thereafter?

Mr. HENGSTLER.—No, I did not say anything about the reef. I said being caught at that bend after the *end* had begun to fall and it is running rapidly. I did not refer to the reef at all. [109]

Mr. DENMAN.—I think your question refers to the reef. Read the question, Mr. Reporter.

(The Reporter reads the question.)

Mr. HENGSTLER.—Q. At Lone Tree Bend I am speaking of. A. Yes, sir.

Q. That is what you were speaking of?

A. Yes, sir; where the rocks were dredged out.

Q. What kind of lights have you got in the night-time on your launch?

A. Just the sailing lights, two bright headlights, and the two sidelights, and the stern light.

Q. They do not spread the light ahead, do they?

A. No, sir.

Q. Can you when you are in the launch in the night-time see any bends in the creek before you get there? A. Yes, sir.

Q. You can see them? A. Yes, sir.

Q. Are you sure of that?

A. Yes, sir, except it is foggy.

(Testimony of William J. Fisher.)

Q. You have also run down that river in the fog, have you not, in the night-time? A. Yes, sir.

Q. In the fog at night-time? A. Yes, sir.

Q. Did you ever run down at new moon in a pitch dark night?

A. I could not tell you the stage of the moon. I know we have come down there when it is foggy.

Q. You have come down when it is foggy?

A. Yes, sir.

Q. Would you go down with a barge in a pitch dark night at new moon?

A. That depends on the conditions of the light. If the fog was not too thick we would come down all right.

Q. When there is no moon at all?

A. And no fog? Is that the question?

Q. And no fog. Would you go down that portion of the river with a barge in tow? A. Yes, sir.

Q. You would? A. Yes, sir.

Q. And you say that on such a night you could foretell when [110] you got to a bend by seeing the bend?

A. You can see most of the bends. You can tell the bends when the shadow of the hills don't strike the water.

Q. The shadow of the hills helps you in seeing the bends? A. It helps you in not seeing them.

Q. How do you see them beyond the point of Lone Tree Bend, before you get to the point in a pitch dark night?

A. You can see where the river starts to bend.

(Testimony of William J. Fisher.)

We don't look over the bend. We keep on going until we see the bend. We come round the curve.

Q. You can see without any headlight or searchlight—it helps you to see the water around the point?

A. You can see far enough ahead to navigate around the bend.

Q. You can see it from your launch?

A. Yes, sir.

Q. How high above the level of the creek are you near when you are in the launch—when you operate your launch?

A. I should judge about 9 feet.

Q. 8 or 9 feet?

A. Above the water.

Q. How high above the bank just before you get to the point of the bend, along Lone Tree Bend, are they?

A. That depends on the tide.

Q. That depends on the tide?

A. Yes, sir.

Q. You usually try to get to that point at what time?

A. Before high water; at high water at the Heads we figure.

Q. Before high water how high are you above the bank, are your eyes?

A. I should judge about 7 feet.

Q. 7 feet above the bank?

A. At big tides.

Q. Is the bank very low there?

A. Yes, sir; that is at high water.

Q. Tell me whether you actually can ever with your eyes see a bend in Napa Creek on a dark night without any moon at all, [111] or whether you are so familiar with that river that you can get through it blindfolded?

A. I would like to try that.

(Testimony of William J. Fisher.)

Q. You would not like to try it? A. No, sir.

Q. Do you mean to say that you can see round the bend before you get to it?

A. You can see the bend far enough ahead so as to figure on getting around the bend without any trouble.

Q. In what regard does the shadow of the hills enter into that question that you mentioned awhile ago? I did not understand that.

A. When we are going upstream in coming round the Bend and going towards the hills the shadow of the hills strikes the water so that you cannot see any distance ahead. You can just see the bright water, and maybe lots of times we would not see over 50 or 60 feet ahead.

Q. In coming down?

A. In coming down the banks don't interfere with us so much; that is, just going up.

Q. How far ahead can you see in a dark night on that river, straight ahead from your launch?

A. I could not say just the exact distance. I would say 100 feet.

Q. 100 feet?

A. Yes, sir. It might possibly be more than that, but you can see the water for quite a little ways ahead when there is no fog.

Q. Have you ever operated a tugboat?

A. Steam?

Q. Yes, steam. A. No, sir.

Q. What is your opinion about the comparative safety in navigating in Napa Creek for the purpose

(Testimony of William J. Fisher.)

of taking these barges down, as between a gasoline launch like yours and a tugboat? Which is the safer method?

A. That depends on the depth of the water. The way it is now the tugboat has no trouble at all coming down. Before the rocks were taken out of there I should think the launch would handle it just as well as a tugboat.

Q. Which is the more powerful?

A. The tugboat. That depends. [112] The "Fox" is only 75 horse-power.

Q. Generally speaking, a tugboat is more powerful and would be more reliable for towage service?

A. Where you have got plenty of water.

Q. Which do you think is the safer one in the bay, a tugboat or your launch?

A. In the bay, if you have a tug with over 100 horse-power, it is better than my launch.

Q. How would a tugboat of 75 horse-power be?

A. I could come down when he could not.

Q. Here on the bay? A. Yes, sir.

Q. How do you account for that?

A. The water broke over his deck so much that he claimed he could not keep steam up.

Q. That would be in a storm?

A. Yes, sir; a small tug, the same size as my launch.

Q. In a storm you think a gasoline launch would be safer in the bay for the purpose of towing a lighter of that kind?

A. That depends on the size of the tug.

(Testimony of William J. Fisher.)

Q. A tug with 75 horse-power?

A. I think if the launch was properly handled it will pull just as good as the tug will, and just about as safe.

Q. Just about as safe as a tugboat?

A. Yes, sir.

Q. Even with a storm in the bay?

Mr. DENMAN.—I should like to object to this line of questions upon the ground that the bay conditions and the creek conditions are entirely different.

Mr. HENGSTLER.—I know that, but one throws light on the other. The witness has testified that he tows these barges down on the bay with a gasoline launch, and that they are just as safe. I can sift his knowledge upon that point, which he has already testified to. I doubt really whether he means that.
[113]

The COURT.—Proceed.

Mr. HENGSTLER.—Q. As you tow your barge down the river do you pay attention to the barge behind you? A. Yes, sir.

Q. How do you do that?

A. Well, coming down them bends you watch behind you to see which way the barge is coming so as to give it the right swing coming towards the curves.

Q. That keeps you occupied sometime, does it not?

A. A few minutes just before you come to the bend.

Q. A few minutes before you come to the bend?

A. Yes, sir.

Q. Then, you have to know, in order to take care

(Testimony of William J. Fisher.)

of the barge, that that bend is a few minutes ahead of you? A. Yes, sir.

Q. You can do all that even in a dark night, can you? A. Yes, sir.

Q. If you were on the bridge of one of the steamers that run up and down the river, would you see from the bridge when a bend is coming in a dark night?

A. I could not tell you that. I never went up on one of those steamers on the bridge.

Q. You could not tell me? A. No, sir.

Mr. BELL.—Q. Would there not be considerable difference in discerning the bend from the bridge of a steamer than in a low launch?

A. Yes, sir.

Q. With a low launch and the reflections of the water ahead of you in a line of 9 or 10 feet, it would be much easier to see than on the bridge of a steamer?

A. No, sir, I believe they claim it is easier from the bridge of the steamer.

Q. Do you know yourself?

A. I could not say for that part of it. It is all I hear them say because I never had any experience on the bridge of a steamer.

Q. You never have had any experience?

A. No, sir.

Q. Have you been up that river all the way to Napa, or up to the head of the tidal flow in that river?

A. I have been up to Napa several times. [114]

Q. The river is quite uniform, almost uniform, is it not, in width?

A. It gets a little narrower according as you go up.

(Testimony of William J. Fisher.)

Q. In some places? A. Yes, sir.

Q. There are no large basins on that river in which the water collects and the ebb tide with a great velocity passes out?

A. No, sir, not after you get up through the bridge a ways—through the railroad bridge.

Redirect Examination.

Mr. DENMAN.—Q. You were speaking of bringing the barges into the bay. Do you take the barge up into the channel sometimes down about the Mission? A. Channel Creek?

Q. Yes. A. That is where we land sometimes.

Q. How wide is that?

A. Down here at Berry Street. Is that the one you have reference to?

Q. Yes. A. I should judge that is 150 feet.

Q. You have no bend and sharp corners coming around there?

A. No, sir, not very many. We keep a ways out and come straight in.

Q. And come straight in? A. Yes, sir.

Q. There is shipping constantly coming in and out there? A. Yes, sir.

Q. Would you consider that a more difficult place or less difficult to handle a barge than Napa Creek?

A. More difficult when there are steamers going out and in.

Q. And do you consider your 50 horse-power launch sufficiently strong to handle barges in that situation? A. Yes, sir, if you are careful.

Q. Channel Creek is a narrow creek running up

(Testimony of William J. Fisher.)

into the south side of San Francisco, is it not?

A. Yes, sir, down at the other side of Townsend Street depot. We do not go all the way [115] up. We go up to the Fourth Street bridge.

Q. How far is that up the creek?

A. I should judge maybe 300 yards.

Q. 300 yards up the creek? A. Yes, sir.

Q. It requires a use of power for handling your barge more than it does on Napa Creek, doesn't it?

A. Yes, sir.

Q. You were speaking of having 350 cubic yards on board as an average?

A. The average would be about 330; 350 would be a pretty good load.

Q. You say you have had more than 350?

A. They claim we have had.

Q. How much was it?

A. They claim one time we had 375.

Q. 375 yards? A. I did not see it measured.

Q. Would you tell you had a big load on?

A. We had a little larger load than before.

Q. A difference of 75 or 50 cubic yards would not make very much difference in handling your boat?

A. Not very much.

Q. What is the width of the water at the bend after you pass that Rocky Reach?

A. I could not tell you just the width of it; I should judge in the neighborhood of 200 feet.

Q. 200 feet?

A. That is about as close as I can guess at it.

Q. You say that you travelled there before this

(Testimony of William J. Fisher.)

dredging was done? A. Yes, sir.

Q. That is a year or so before that, before they cleaned out the Rocky Reach?

A. I believe that was cleaned out in May, 1910. March, 1909, we started, but we did not go above Rocky Reach. When we started we were in Suscol Reach.

Q. How long had you travelled in Rocky Reach before it was dredged out?

A. I could not say the exact time.

Q. A number of trips? A. Yes, sir.

Q. You were passing by when they were engaged in dredging? A. Yes, sir. [116]

Q. That cut down the amount of space that you had? A. Yes, sir.

Q. You did get through there?

A. If they had shoved the dredger over against the starboard bank we would have had no difficulty at all in getting by.

Q. You say it requires much more power to handle your barge in the bay than it does in the creek, is that correct?

A. If you were going to try to run against the tide. We always wait until the tide is in our favor.

Q. You say the wind and the tide conditions give you more trouble on the bay than in the creek?

A. You have to be more careful.

Q. You have to use more power?

A. We have about the same all along, but there is no danger in Napa Creek.

Q. Could you handle another hundred cubic yards

(Testimony of William J. Fisher.)

with that power without any difficulty in Napa Creek? A. I think we could.

Q. You spoke of your experience with the launch. Have you commanded a launch during the last nine years? A. Yes, sir.

Q. Owned a launch during that time?

A. Yes, sir.

Q. What did you do before that?

A. I was down here where they were reclaiming the land down in the bay, four years or a little more.

Q. What were you doing?

A. Where they were reclaiming the land, attending dredgers.

Q. You have seen the moving of dredgers and handling large box and ship craft?

A. Yes, sir. That was a 30 horse-power boat.

Q. You move your dredger with a 30 horse-power boat? A. Yes, sir.

Q. How would that dredger run in size compared with your barges?

A. The largest, I believe, was 50 by 110.

Q. That would be much more unwieldy than a barge of the size of your largest barge?

A. Yes, sir. [117]

Q. Much more difficult to handle? A. Yes, sir.

Q. You say it was handled by a 30 horse-power boat?

A. Yes, sir. We had to wait for the tide in our favor. All that work is tide work.

Q. How does the tide on the bay compare in strength with the tide in the creek?

(Testimony of William J. Fisher.)

A. It is stronger. It is swifter.

Q. Swifter in speed and power? A. Yes, sir.

Q. How does the tide run in the creek? What is the fastest tide in the creek?

A. That is pretty hard to judge. I think the fastest is when you get pretty well down, it might be two miles an hour.

Q. It might be two miles an hour?

A. Yes, sir, that is as close as I can guess at it.

Q. It would not be as fast in Horseshoe Bend?

A. No, sir, not unless the freshets were coming down.

Q. I mean any ordinary tide and condition?

A. Yes, sir.

Recross-examination.

Mr. HENGSTLER.—Q. Mr. Fisher, what is Channel Creek? A. Channel Creek?

Q. Yes, is it a creek?

A. Well, no, it ain't exactly a creek; I don't think it is; they call it Channel Creek. That is the name of it I believe.

Q. What is it?

A. It is the channel they have out there on Beale Street, on the other side of Beale Street and it runs up to Third and Fourth Streets to Sixth Street.

Q. A part of the Bay of San Francisco, is it not?

A. Yes.

Q. How wide is it, do you know?

A. Well, I should judge about 150 feet, where the Bay Development Company has got their bunkers.

Q. Where have they got their bunkers, at the en-

(Testimony of William J. Fisher.)

trance to the channel?

A. Close to the Fourth Street bridge.

Q. Close to the Fourth Street bridge. Is it of a uniform [118] width or does it narrow down?

A. It is pretty close to uniform after you get through the First Street bridge.

Q. But before that how wide is it?

A. It widens out a lot down at the foot of the Second Street bridge; I don't know how wide it would be down at Second Street, down from the Santa Fe.

Q. It is wider there, is it not? A. Yes.

Q. Much wider, is it not?

A. It is quite a lot wider.

Q. How wide is it at the entrance?

A. Well, at the entrance I guess it would be about the foot of Second Street—I would not say what its width was there.

Q. Would you say it was 400 feet there?

A. Well, I could not say just exactly.

Q. Well, give us your estimate. It is 400 feet there, or more, is it not, at the entrance?

A. It is pretty close to 400 feet at the entrance, between three and 400 feet; I do not know exactly the width there.

Q. Do you say that is a difficult place to get into?

A. When a steamer is in the way you have got to get around the steamer.

Q. Of course, it is full of steamers?

A. There are steamers going in and out, and then it is more difficult.

(Testimony of William J. Fisher.)

Q. If there are no steamers in there, no ships, it is very easy?

A. If it is clear and nothing in the way it is easy to go in, but the most of the time there are steamers in the way.

Q. So that when you said it was a more difficult place to navigate than Napa Creek, you meant on account of steamers that are in your way and that you have got to avoid? A. Yes. [119]

Q. What is the usual method of towing barges, these gravel barges, ordinarily, of large size, here in the bay; are they usually towed by gasoline launches, or not?

A. Well, I could not say; there are quite a number of launches and there are also a number of tugs doing towing, so I could not say which would bring the most barges down.

Q. Isn't far the greater number of barges towed in this bay by tugs?

A. Of course, the most of them is in the bay—the big barges mostly are towed by *barges*, at least I think they would be; but Mr. Crowley does a lot with his launches.

Q. Nevertheless you say that a gasoline launch is safer than a tug, do you?

A. No, I do not say it is safer than a large tug.

Q. Than a large tug. How large tug?

A. Anything from 100 horse-power up, they will handle a barge in the bay better, the largest tugs. But if you take a 50 horse-power tug, or small tug, you can handle it as well with a 50 horse-power gaso-

(Testimony of William J. Fisher.)

line as they can. But the larger tugs, they can handle them much better.

Q. You say you saw the dredging at Horseshoe Bend in 1910, sometime in 1910?

A. I think that is about the time, I think it was May, 1910; I ain't sure; I think that is about the date.

Q. Do you know whether there had been any dredging going on in that place before that?

A. In the Horseshoe Bend?

Q. In the years before 1910, in the year 1909 and 1908?

A. I could not say.

Q. You don't know about that?

A. No.

Q. As a matter of fact at different places in the creek, they are being constantly dredged out, aren't they?

A. Yes, sir.

Q. When you spoke of the swiftness of the tide in Napa Creek [120] and the greatest swiftness as being 2 knots an hour, you are guessing, are you not?

A. We don't know that.

Q. It might be 4 knots an hour, might it not?

A. We could not tell that until it is tested.

Further Redirect Examination.

Mr. DENMAN.—Q. You are certain though that the rate in the creek is less than it is in the bay?

A. Yes.

Q. About what is the maximum rate of the tide in the bay, do you know?

A. Well, I could not tell you just what that would be either.

(Testimony of William J. Fisher.)

Q. What is it commonly estimated at amongst seamen?

A. They figure on an average of about 3 miles.

Q. An average of about 3 miles? A. Yes.

Q. And the maximum is considered to be about 4, isn't it? A. I believe it is.

Q. That is inside the heads, inside the run at the Golden Gate?

A. I could not say for certain as to what it is.

[Testimony of Christian Johansen, for Respondent.]

CHRISTIAN JOHANSEN, called for the respondent, sworn.

Mr. DENMAN.—Q. Mr. Johansen, what is your occupation? A. I am a boatman.

Q. You *You* are a boatman? A. Yes.

Q. What class of boats do you handle?

A. Gasoline boats.

Q. How long have you been handling gasoline boats? A. About six years, I guess.

Q. Six years? A. About six years.

Q. What is the size of your boat now?

A. It is a 50 horse-power launch.

Q. Where do you run?

A. Run to Sonoma Creek.

Q. Are you familiar with Napa Creek?

A. I am. **[121]**

Q. How do the two creeks compare in the difficulty of navigation? Which is more difficult?

A. The Sonoma Creek.

Q. Why is that?

(Testimony of Christian Johansen.)

A. Because it is not as wide as Napa Creek.

Q. Not as wide as Napa Creek? A. No.

Q. How long ago was the first time you ran up Napa Creek? A. Oh, about 1905.

Q. That Rocky Reach they have been speaking of was there then, was it? A. It was.

Q. Would you have any difficulty in handling a barge with your gasoline launch say—

Mr. HENGSTLER.—(Intg.) I submit to your Honor it does not appear that he ever handled a barge.

Mr. DENMAN.—I have not quite finished my question. However, I withdraw the question.

Q. You have been towing as well as carrying with your launch? A. I have.

Q. Towing and carrying both?

A. No, not carrying at all.

Q. Only towing? A. Yes.

Q. What—towing what,—lighters and barges?

A. No, towing scow schooners.

Q. Scow schooners? A. Yes.

Q. How are they built?

A. Practically like the barge, only they turn in to the ends more than a barge; they are built for sailing more than a barge.

Q. You have been at that how long?

A. About seven years.

Q. Have you handled some barges during that time?

Q. Yes, the last couple of years we have handled barges in Sonoma Creek.

(Testimony of Christian Johansen.)

Q. Barges in Sonoma Creek? A. Yes, sir.

Q. Let me ask you; how many times do you suppose you have been up to Napa Creek?

A. Well, I don't know; quite a few times. [122]

Q. Twenty times?

A. More than that; a couple of hundred times.

Q. What would you say about the ability of a launch of your size to tow a gravel barge 38 by 130 up and down that creek?

A. Well, I never tried—I never handled a barge that large, but I have seen other boats going out and in with them all times.

Q. From your knowledge of handling launches, do you think you would have any difficulty?

A. I would not; no.

Q. With a launch of your size. Do you think you would have any difficulty with a launch of your size, handling a barge of that size?

A. No, I would not.

Q. You have been clear to Napa, haven't you, before the Rocky Reach was blown out? A. Sure.

Q. You are familiar with the conditions as they were then? A. I am.

Q. Let me ask you about that night. Suppose, now, it is a dark moonless night, you simply have the stars to go by, would you have any difficulty in handling it? A. No.

Q. Suppose it is overcast but there is no fog, can you still handle it on those curves? A. Yes.

Q. As a matter of fact you do come down in the fog, don't you, sometimes?

(Testimony of Christian Johansen.)

A. Yes, in the daytime, we do, in the fog.

Q. But not at night? A. Not at night, no.

Q. I don't know as I asked you why it is more difficult to come down Sonoma Creek than Napa Creek?

A. It is narrower; there isn't so much room.

Q. How about the water, the depth of water?

A. There ain't so much water either.

Q. There isn't so much water? A. No.

Cross-examination.

Mr. HENGSTLER.—Q. Are you working for yourself, Mr. [123] Johansen?

A. No, I am working for Castoretto, John Castoretto.

Q. What business is that? A. Gravel business.

Q. Gravel? A. Gravel and sand.

Q. Gravel and sand? A. Yes, and crushed rock.

Q. How long have you been working for them?

A. About seven years, Castoretto and me were partners since last April; I was in business with him.

Q. What duties do you perform in that business, either as an employee of Casteretto or as a partner in the business? A. How do you mean?

Q. What are your duties in that business?

A. My duties, that is to look after the vessels going out and see that the engines are in shape and so forth.

Q. See what?

A. See the gas-engines—we have got 3 or 4 gas-engines running and it is my duty to see that they are in condition to run.

(Testimony of Christian Johansen.)

Q. Are the gas-engines on land?

A. Not on land, on launches.

Q. On the launches?

A. And the dredgers—the pumping plant.

Q. You own dredgers and you own launches, do you?

A. Yes.

Q. How many dredgers do you own?

A. One.

Q. One dredger?

A. Yes.

Q. How many gasoline launches?

A. Two.

Q. You own two gasoline launches?

A. Yes.

Q. What are their names?

A. “McKinley” and “McKinley No. Two.”

Q. What is the power of those launches?

A. One is 50 and the other is 25.

Q. Do you navigate both of them?

A. I am, yes.

Q. Where?

A. Sonoma Creek.

Q. Both in Sonoma Creek?

A. Yes.

Q. Have you ever navigated those launches in Napa Creek? [124]

A. I have, yes; the “McKinley” is navigated in Napa Creek.

Q. The “McKinley” has navigated in Napa Creek?

A. Yes.

Q. Did you ever tow yourself in Napa Creek?

A. Yes.

Q. With which one of these launches?

A. The largest one.

Q. With the larger one, the 50 horse-power?

A. The 50 horse-power one, yes.

(Testimony of Christian Johansen.)

Q. When was it that you were in Napa Creek with that launch?

A. Well, it was in—it was after the fire; I was running myself for a couple of years at that time.

Q. You were running?

A. In 1906 and 7 I was navigating her myself.

Q. 1906 and 7?

A. Yes, and then on several occasions I made trips, you know, now and then.

Q. But you say in 1906 and 1907 you operated that launch in Napa Creek? A. Yes.

Q. Regularly? A. Regularly, yes.

Q. Exclusively in Napa Creek?

A. No. I was at the San Joaquin River. I was there on Sundays several times.

Q. How often were you at Napa Creek at that time?

A. Oh, about twice and sometimes three times a week.

Q. Twice and sometimes three times a week?

A. Yes.

Q. During this whole two years? A. Yes.

Q. How high up Napa Creek did you ever go with your launch?

A. Well, I have gone up to the town.

Q. To the town of Napa?

A. To the town of Napa.

Q. With any tow? A. Yes.

Q. Or lighters? A. I had a schooner in tow.

Q. You had a schooner in tow? A. Yes, sir.

Q. You have never gone up to Napa with any

(Testimony of Christian Johansen.)

lighter, have you? A. I have not, no.

Q. Have you ever come down from the river with a lighter in [125] tow? A. I have not.

Q. You have never towed any lighters in that creek at all, have you? A. No.

Q. Either loaded or unloaded? A. No.

Q. You state that there is no difficulty in negotiating the curves in Napa Creek, or these bends. What do you mean by that? Do you mean that there is no difficulty in negotiating these curves with your launch?

A. No, there is not, with the launch and tow both.

Q. With the launch and one of these schooners?

A. No, no difficulty.

Q. No difficulty? A. No difficulty.

Q. You said no difficulty in having one of these schooners in tow? A. No.

Q. That is all you meant by it?

A. That is all I meant, yes.

Q. Have you ever come down the creek with one of these schooners in tow at night? A. Yes.

Q. You have? A. Yes, lots of times.

Q. From how high up?

A. From—well, about half a mile above the Rocky Reach.

Q. Have you ever noticed whether you can in coming down the creek see from your launch any approaching bend, and the portion of the creek that is beyond the point?

A. No, I never took notice of that.

Q. You never noticed that?

(Testimony of Christian Johansen.)

A. No. We were so used to going up and coming down we didn't think nothing of it because we knew the curves as we went along.

Q. You saw the curves? A. We saw the curves.

Q. Because you saw the curves?

A. Yes, and we knowed it was there by experience.

Q. You had been there often enough to know that the curve was there? A. Yes. [126]

Q. Could you navigate there blindfolded, could you take your launch down the Napa Creek blindfolded? A. No.

Q. You have not had as much experience as all that? A. No.

Q. You would have to see the bends, wouldn't you?

A. Yes.

Redirect Examination.

Mr. DENMAN.—Q. But, Captain, you say in your opinion there would be no difficulty in handling a barge of the size I have described with a launch of your power? A. No.

Q. Now, you say you have a 25 horse-power launch in Sonoma Creek, and you have been handling barges in there? A. Yes.

Q. With 25 horse-power? A. Yes.

Q. And what doing—carrying gravel? A. Yes.

Q. Now, this dredger that you speak of, how large is that dredger?

A. Oh, that is about 45 by 20, I guess.

Q. 45 by 20. What does she draw?

A. Oh, about 4 feet, I guess.

Q. What do you handle her with, the 25 horse-

(Testimony of Christian Johansen.)

power? A. Yes.

Q. Have any difficulty in doing that? A. No.

Q. How about the curves and turns in Sonoma Creek, are they quicker or less sharp than those in Napa Creek?

A. They are sharper in Sonoma Creek.

Q. Sharper in Sonoma Creek? A. Yes.

Q. How would you say Napa Creek compared with the other creeks around the bay for difficulty in navigation, is it easier or harder?

A. Oh, it is easier than Sonoma Creek.

Q. Have you ever been in the channel down here in the southern portion of the city? A. Yes.

Q. Would you consider that, coming in there with vessels as you find them at the mouth of the channel, more difficult or less difficult than coming down Napa Creek?

A. It is more difficult to come down the bay; that is, it depends upon the weather conditions. [127]

Q. I want to get a picture in the Court's mind of the conditions of the channel here. There is a very large amount of shipping going in and out of the channel? A. Yes.

Q. And steamers are met at the entrance very often? A. Yes.

Q. You have to maneuver in and around those steamers to get in? A. Yes.

Q. Now, is your launch powerful enough to manage those large barges in and around those steamers?

A. Yes.

Mr. HENGSTLER.—We have not heard anything

(Testimony of Christian Johansen.)

about large barges yet.

Mr. DENMAN.—Q. I have reference to barges running from 38 to 130 feet in length. You say that your launch is powerful enough to manage the barges in and among the ships? A. I think it is.

Q. Do you see that done right along there?

A. I see that done right along there.

Q. Had you been aboard the “Pickett”?

A. Not that I know of.

Q. Never seen her—you saw her operating in Napa Creek?

A. No, I do not think I was there at the time.

Q. Have you ever seen these barges, these American-Hawaiian barges that went up and down that creek? A. I saw the one that was sunk up there.

Q. You saw the one that was sunk up there?

A. Yes, after she was sunk, I went up there a couple of days after she was sunk.

Q. She was lost, wasn't she? A. Yes.

Q. What was the heaviest load you ever towed on Sonoma Creek with the 25 horse-power launch?

A. Oh, about 200 cubic yards.

Q. 200 cubic yards with the 25 horse-power launch? [128]

A. Yes, 25 horse-power launch.

Q. That was in barges, in a barge? A. Yes.

Recross-examination.

Mr. HENGSTLER.—Q. You expressed an opinion with reference to the handling of a barge in Napa Creek by a launch of 50 horse-power, did you not?

A. Yes.

(Testimony of Christian Johansen.)

Q. What is your opinion, is it easy to handle it or is it difficult to handle?

A. It is easy to handle it.

Q. What do you base your opinion on—you have never done it yourself, have you?

A. No, but I have seen them going out and in there.

Q. You have seen them? A. Right along.

Q. Have you seen them going out and in there?

A. Yes.

Q. Whom did you see going out and in?

A. I saw the Bay Development Company's barges going in and out while we were there with our boat.

Q. In what place in Napa Creek have you seen the Bay Development barges?

A. I have seen them coming out from about half a mile above Rocky Reach, and right out through the rocks.

Q. To the railroad bridge?

A. Yes, out to the Santa Rosa drawbridge there.

Q. When was that that you saw that, in the day-time or night-time?

A. I have seen them in the daytime and also seen in the night.

Q. You have seen them coming down in the day-time? A. Yes, and also at night.

Q. Have you seen many of them coming down or going up towed by tugs? A. Yes.

Q. You have seen that? A. Yes.

Q. Also by gasoline launches? A. Yes.

Q. Have you seen more by tugs or more towed

(Testimony of Christian Johansen.)

by launches? A. Seen most by launches. [129]

Q. Most by launches? A. Yes.

Q. You have never done either yourself, either with a tug or a gasoline launch?

A. No, not in Napa River.

Q. Have you ever seen them going around one of those bends in Napa River, like Horseshoe Bend or the Lone Tree Bend? A. Yes.

Q. How often have you seen that?

A. Oh, a number of times.

Q. How often? A. I don't know.

Q. Have you seen it fifty times?

A. Yes, all of that.

Q. All of that? You have seen it 50 times, going around the bend? A. Sure of that.

Q. What were you doing there when that was going on?

A. I was there operating our boats there at that time; we were loading close together there, and we went out together; sometimes we went ahead and sometimes behind.

Q. What year was that in?

A. That was in 1906 and 1907.

Q. 1906 and 1907? A. Yes.

Q. Were you running on the Napa River at the times when this lighter was destroyed there?

A. Yes.

Q. Your opinion as to the difficulty is not based upon any experience but simply what you think from seeing these barges go up and down; that is all?

A. Yes.

(Testimony of Christian Johansen.)

Q. What is your opinion about the difficulty and danger in going down the river on a pitch dark night around Horseshoe Bend and Lone Tree Bend?

A. Oh, there is no difficulty in Napa River; there is plenty of room there to go down; we have gone in and out there a number of times, several times.

Q. Would there be any difficulty if the launch with her tow arrived at Lone Tree Bend at the time when the ebb is falling rapidly?

A. I think there would be, yes.

Q. You think there would be? A. Yes. [130]

Q. And besides its being dark and besides a man being in charge who had never gone over that place before?

A. I think that would be pretty risky.

Q. You think that would be very risky, don't you?

A. Yes.

Q. In other words, it is your opinion, is it not, that it would require a very considerable skill to get around that point there with a gasoline launch of 50 horse-power having a very large barge in tow, a barge which is 38 feet wide and at least 120 feet long, and is heavily loaded, that has a large load on her of 400 cubic yards—you think that would be a pretty risky business wouldn't you?

A. Yes, in a falling tide, in an ebb tide.

Q. The tide makes a big difference, does it not?

A. Yes.

Q. What difference does it make?

A. It makes that much difference that if you have to run into the bank and get stuck, get on to the bank

(Testimony of Christian Johansen.)

you can't get her off again.

Q. If the tide falls rapidly it takes the barge down in a straight direction rapidly and she is likely to go on shore is she not? A. Yes.

Q. Unless she has got a launch which is powerful enough to keep her in the channel, isn't that so?

A. It don't depend on the power so much, as I think a 50 horse-power launch has plenty of power to keep her clear of the banks, but by coming along the curve, she will naturally swing over to the point and might get stuck on something.

Q. Naturally run in a straight direction?

A. Yes.

Q. Who asked you to come here as a witness, Mr. Johansen? A. Mr. Bell.

Q. How long ago did he first speak to you about this matter? A. Yesterday. [131]

Q. That was the first you ever heard about it?

A. Yes.

Redirect Examination.

Mr. DENMAN.—Q. Coming down Napa Creek, you always come down on the ebb tide, don't you?

A. No, sir.

Q. You don't buck the flood coming down there, do you? A. Always.

Q. You always buck the flood? A. Yes.

Q. You do not come down, float down with the ebb tide? A. No.

Q. Why don't you do that?

A. Because it is better to go out against the tide; it gives you a better chance in case you should get stuck

(Testimony of Christian Johansen.)

to get them off again.

Q. Don't you know that it is the practice on that creek ordinarily with these gravel barges, to come down on the ebb tide?

Mr. HENGSTLER.—He has answered that it was not.

Mr. DENMAN.—Q. Don't you know it is customary for these gravel barges coming down there to come down on the ebb?

A. They usually start before high tide up there; generally start at high tide at the bar; that makes about two hours before high water up there.

Q. Well, then, how far do you get down before you get the ebb?

A. You do not get very far, about a mile; then you get the ebb.

Q. You usually get the ebb somewhere around Rocky Reach, don't you?

A. No. I mean a mile or so after we get by the Rocky Reach; it is the regular practice to go through there at rising tide.

Q. Going through at that time in the event you get on— A. (Intg.) You will get off.

Q. You saw this barge lying there that was wrecked? A. I did.

Q. You think you would not have any difficulty in handling [132] her with a launch, with your 50 horse-power launch? A. No, sir.

Q. Then it is a question of the choice of the time to come around that point, is it? A. Yes.

Q. And the man who is navigating must make up

(Testimony of Christian Johansen.)

his mind as to the wisdom of picking a particular time to come around? A. Sure.

Q. And your idea is that it is not so much a question of power as it is skill in directing her as you go around there?

A. No, we operate barges with a 25 horsepower in Sonoma Creek that carry about 200 yards, and we have no difficulty in towing down about 3 or 4 miles.

Q. Now, did you know Latimore? A. No.

Q. Who handled the "Pickett"? A. No, sir.

Q. Have you ever seen any of the other barges—what other barges belong to the Bay Development Company that have gone in there—do you know the names of them?

A. Yes, the "Colorado" and "Arizona."

Q. Have you ever seen those lighters or barges "Number One" and "Two" of the American-Hawaiian, other than the one that was wrecked, have you ever seen the others?

A. No, not that I know of. I don't know that I ever saw them.

Further Recross-examination.

Mr. HENGSTLER.—Q. In your opinion the navigation of the launch with her tow, with a barge in tow, should be regulated in such a way that you started from your starting point before high tide?

A. Yes.

Q. Two hours before high water?

A. Not exactly two hours, but it is necessary to

(Testimony of Christian Johansen.)

have time enough to get over that place on rising tide.

Q. Getting caught by the ebb tide before you get to that [133] place is dangerous, is it not?

A. Well, it is, yes, more or less. We have gone over there on falling tide at times, but I do not like it.

Q. You might get through all right?

A. And we might not.

Q. It is risky?

A. We might and we might not, it is risky.

Further Redirect Examination.

Mr. BELL.—Q. Now, you say you have gone through there a number of times on the ebb tide?

A. Well, it is very seldom that we did—yes.

Q. You would rather go through on the other condition of the tide, but you have gone through there a number of times on the ebb tide? A. Yes.

Q. Now, you said awhile ago that it was with some risk and then you qualified that by saying that the risk arose from the fact that if you should happen to get against the opposite bank or against the bank, that it would be more difficult to get the barge off if there was an ebb tide than it would if there was a flood tide? A. Yes.

Q. And that is the risk that you speak of, isn't it?

A. Yes.

Q. The risk that if you did go ashore it is more difficult to get off again? A. Yes.

Q. But now, with the tide just beginning to ebb,

(Testimony of Christian Johansen.)

we will say, just beginning to ebb, with a horse-power of 50, a launch coming around there of 50 horse-power, it is practicable and reasonably safe, is it not?

A. It is at slack tide; that is the best time to go.

Q. You testified that the tide was not swift in the river at that point?

A. No, it is not swift there.

Mr. HENGSTLER.—When did he testify to that?

Mr. BELL.—He testified that at the bridge some miles above it was not swift. [134]

Mr. HENGSTLER.—I do not remember that.

The WITNESS.—I did not testify to that.

Mr. BELL.—Q. Was it swift or not at that point?

A. No, it don't run very swift there.

Mr. HENGSTLER.—At what time? There are different degrees of swiftness.

Mr. BELL.—Q. In the absence of any freshet, in the ordinary tidal movement, is it swift or slow at Horseshoe Bend?

A. Slow tide; it don't run very strong there.

Q. So that the real danger or risk that you have attempted to describe is the one in the event that the boat or craft that you are towing may get in against the bank and it is difficult to get her off with the falling tide? A. Yes.

Mr. DENMAN.—Q. Mr. Johansen, when is the tide swiftest on the ebb?

A. Oh, about half tide.

Q. About half tide? A. Yes.

Q. An hour or an hour and a half after high tide

(Testimony of Christian Johansen.)

it has not got its full speed, has it? A. No.

Further Recross-examination.

Mr. HENGSTLER.—Q. Mr. Johansen, Mr. Bell spoke of this element of risk at the particular spot being that if your barge gets ashore it will be more difficult to get her off at the falling tide than it would be at a rising tide? A. Yes.

Q. That is not the only element, Mr. Johansen. You have stated before, have you not, that another element of risk and of danger is that in a falling tide the barge is more likely to go ashore?

A. Yes.

Q. That is another element is it not, of danger?

A. Yes.

Mr. DENMAN.—Q. But as I understand you, you operate barges there at all times, yourself, but you prefer the flood tide?

A. I prefer the flood tide. [135]

Q. But you have operated at all times in there?

Mr. HENGSTLER.—He never said he had operated barges there.

Mr. DENMAN.—Schooners and tows through there at all times.

Mr. HENGSTLER.—Schooners, not barges.

A. That is right.

Further Redirect Examination.

Mr. BELL.—Q. Can you give us some idea as to about what rate of speed these towboats take these barges or scow-schooners out of that river above Horseshoe Bend?

(Testimony of Christian Johansen.)

A. That is pretty hard to say.

Q. Suppose you pick up a scow-schooner of gravel a mile above this Lone Tree Bend and start out with her, how long about would it take you to reach Horseshoe Bend?

A. It would take about 20 minutes, half an hour or so.

Q. Twenty minutes or half an hour? A. Yes.

Q. Do you know about how far the Asylum wharf, how far it is above the Rocky Reach?

A. Above the Rocky Reach?

Q. Yes.

A. I should judge about a mile; it might be a little less than that, perhaps.

Q. Were you there in the river operating any boat on or about April 11, 1907?

A. No, I was not up that far.

Q. You were not operating about that time on the river? A. Yes, we were operating.

Q. Now, do you know the point on that river where this big barge "Number One" that was being used by the Napa Gravel and Material Company was being loaded by what is known as the Durfee Dredger?

A. Yes, sir.

Q. Now, about how far above the Lone Tree Bend was that loading done?

A. Well—I guess it is about a quarter of a mile [136] or so, something like that—about a quarter of a mile above the Bend.

Mr. DENMAN.—Q. Now, suppose they left this place at high tide a quarter of a mile above the bend,

(Testimony of Christian Johansen.)

and it was just at flood, would she get any considerable amount of tide ebbing as she came down through the bend in that quarter of an hour?

A. No, that should not make much difference; the tide don't start to run as quick as that.

Q. It does not start to run as quick as that?

A. No.

Q. So if they left at the crest of the flood, at the top of the flood, they would not be getting any considerable current at the time they went through the bend? A. Not very much, no.

Q. That would be perfectly safe to go through, at that time, would it? A. Oh, yes.

Q. Whereabouts was that dredge lying, do you remember? A. Where she was lying?

Q. Yes.

A. It was around a couple of reaches; it was not up very far.

Q. Right around what?

A. It was right around from this here Horseshoe Bend, where the next reach is.

The COURT.—Q. Below the bend, you say?

A. Not below; above Horseshoe Bend, the next reach.

Mr. DENMAN.—Q. It had not got into the bend where the rocks was? Here is the beginning of that bend; there is a point runs out there (illustrating). Here is where she runs in again.

A. Here was where the dredger was lying.

The COURT.—Q. The dredger? A. Yes.

Q. That far above the point, like that? A. Yes.

(Testimony of Christian Johansen.)

Q. It was not down here (indicating)? A. No.

Mr. DENMAN.—Q. Where was the barge lying?

A. The wrecked barge was—she was right below the reach [137] there; I don't know how far it was; it was not very far.

Q. She had just got into this reach?

A. She was right by the rock there.

The COURT.—Q. Now, is the rock above the bend, above where it turns, or below?

A. No, right in the bend.

Q. The rock is right in here and the rock was below the rock? A. Yes.

Mr. DENMAN.—Q. How much below, two or 300 yards? A. A couple of hundred yards.

Mr. HENGSTLER.—Q. 100 yards or a couple of hundred yards?

A. A couple of hundred yards below the rock.

Mr. BELL.—Q. This pumping plant that loaded the barge you think was up about that point, about a quarter of a mile above there?

A. As far as I remember; I am not sure about that; it seems to me that it was there.

Mr. DENMAN.—Q. You say about a quarter of a mile up? A. Yes.

Mr. BELL.—Q. Do you remember along here a grove of trees on the Asylum side of the river?

A. Yes.

Mr. HENGSTLER.—Q. This is not the Asylum wharf; here is the Asylum wharf, over here.

The WITNESS.—I thought it was lower than that.

Mr. BELL.—Q. You think it was about a quarter

(Testimony of Christian Johansen.)

of a mile to where she was wrecked? A. Yes.

Mr. HENGSTLER.—Q. The dredging plant that loaded the barge was down here (pointing)?

A. Yes.

Mr. DENMAN.—Q. Somewhere in the neighborhood of “T” on the map, somewhere around there?

A. Yes.

Mr. HENGSTLER.—Q. You don’t think it is nearer to the asylum? A. No.

Mr. DENMAN.—Q. Now, let me ask you. Look at this map. [138] Suppose you left here at high water, would he have any dangerous ebb by the time he reached there?

A. No, it is only a little distance. That don’t take long to go through. It only takes a quarter of an hour; that is no distance.

Mr. HENGSTLER.—Q. If he left exactly at high-water and he was going for two hours and two hours afterwards he got to this Lone Tree Bend, would he be in danger then? A. Sure.

Mr. DENMAN.—Q. What would be the danger from, if he got on the rocks?

A. Yes, he might sweep over when the tide begins to run swift; they always follow those bends—you come along there and the tide keeps on this course.

The COURT.—Q. Keeps it back there (pointing)?

A. Yes, so that it will bring the barge in on that run there with a swift ebb tide.

Mr. BELL.—Q. Let me ask you this: do you know of any reason that would require him to take two

(Testimony of Christian Johansen.)

hours passing from the place where you saw this pumping dredge down to this turn, unless he was bucking the tide and going out on a big tide?

A. It would not take two hours against the tide to go down that far.

Q. Certainly if it were ebbing it would not take more than a few minutes? A. No.

Mr. HENGSTLER.—Q. Might not one of the reasons and a very natural reason be that he had trouble on the way down and got ashore somewhere and had to pull his barge off afterwards, and that took some time—you would not possibly know that, as to whether that happened or not? A. No.

Q. But that might be one of the reasons that it took him two hours? A. Yes.

Mr. DENMAN.—Q. How long would it take to run from the Asylum wharf up here going with the tide down to the bend? [139]

A. With a barge in tow?

Q. Yes, with a 50 horse-power launch?

A. That would take about three-quarters of an hour.

Q. Three-quarters of an hour?

A. Yes; it might be an hour against the tide.

Q. And if he left at high tide that hour would not bring any difficulty at the reef, would it? A. No.

Mr. HENGSTLER.—Q. You mean that would be under normal circumstances, where nothing happened? A. Yes.

Q. Between those two points? A. Yes.

[Testimony of James H. Bennett, for Respondent.]

JAMES H. BENNETT, called for respondent, sworn.

Mr. DENMAN.—Q. Captain, what is your occupation?

A. Master mariner, and handling shipping properties and so forth.

Q. How long have you had your license?

A. I have had my license since 1883.

Q. Navigate on this bay? A. Yes.

Q. Manage shipping properties on this bay?

A. Yes.

Q. Over a good many years, haven't you?

A. Yes.

Q. You are familiar with the waters of Napa Creek? A. Yes.

Q. Sailed up and down there? A. Yes.

Q. Are you familiar with the towing of barges and vessels in and out of the waters of the bay?

A. Yes.

Q. What can you say as to the navigability of the waters of Napa Creek for barges of the type of barge "Number One" or lighter "Number One" of the American-Hawaiian Steamship Company that you chartered from them?

A. There is no trouble in navigating them as long as there is water enough to float them.

Q. What would you say as to the advisability and propriety of [140] using a 50 horse-power launch for handling such barges in that creek?

A. I think it is ample power.

(Testimony of James H. Bennett.)

Q. You think it is ample power? A. Yes.

Q. About what would be a fair load of gravel for those barges, do you know?

A. About 500 cubic yards.

Q. If they were carrying 350 to 400 cubic yards, it would be considerable under their load, would it not?

A. Yes.

Q. So that they would be more navigable with that lighter load?

A. Yes, as far as they would be lighter draft, they could go where there was less water.

Q. Would it make any real difference in the towing of that with a 50 horse-power launch?

A. Very little difference.

Q. Now, about making the turns in that creek, what would you think of the advisability in negotiating those turns on the ebb tide?

A. I do not think there would be any trouble on the ebb tide provided it was not the very rush of that tide, which at no time is very great in Napa Creek.

Q. When is the worst, the greatest rapidity, of the tidal movement?

A. I should imagine about four hours before and after high water.

Q. You recollect chartering these vessels?

A. Yes.

Q. And you sub-chartered them to the Napa Gravel & Material Company? A. Yes.

Q. You have chartered many barges, have you, in your experience here?

(Testimony of James H. Bennett.)

A. Yes. I have been part owner in a great many barges and bay schooners, bay properties as well as ocean property.

Q. Familiar with the handling of them?

A. Yes.

Q. Now, when you made this sub-charter to the Napa Gravel Company, did you know anything about the power of the launch [141] that was handling them there? A. Yes.

Q. You knew that. Had you ever been up there?

A. I had, yes.

Q. Do you know whether Crowley is a competent man to pick a launch for that business?

A. I think he is; he has had more experience than anyone else on the bay in **that line**.

Q. He has the largest launch plant on the bay, hasn't he? A. Yes.

Q. Did you have anything to do with the dispatching of the boats up there, any details of that kind?

A. Well, not at that particular time. I had the other barges there about that time.

Q. I mean as to picking the time as to dispatching the various barges, you had nothing to do with that?

A. No.

Q. That is left entirely to the man of the launch?

A. Yes.

Q. And he has to pick his time for going through?

A. Select the time more appropriate to come down.

Q. Let me ask you: do you know of any larger barges than "Number One" and "Number Two" that went up Napa Creek? A. Yes.

(Testimony of James H. Bennett.)

Q. What were they?

A. What is known on the bay as the California Stevedoring & Ballast Company Barge "Number Two" and the barge "Energy."

Q. They are larger than this "Number One" and "Number Two"? A. Yes.

Q. How much larger are they?

A. Well, around about 200 tons larger.

Q. 200 tons larger? A. Yes.

Q. How were they taken up?

A. They were taken up by steam tug as far as Suscol and naturally from there with gasoline up, the upper part.

Q. This same type of launch that was used on this very barge?

A. Yes, I think the "Pickett" did tow the "Energy" once or twice, and the other launch is about the same power. [142]

Q. The "Pickett" is the usual size of launch for that sort of towage in these waters? A. Yes.

Mr. BELL.—Q. I would like to have you indicate on this chart, I think it is already indicated, it is right on the opposite point from this Lone Tree Bend—

The COURT.—Q. (Intg.) Where is the Railroad drawbridge that has been referred to?

A. Right down here (pointing).

Q. That is where I supposed it was.

A. There is a drawbridge above here, too.

Q. This is the one here I mean.

Mr. HENGSTLER.—Q. What is that point?

(Testimony of James H. Bennett.)

A. Suscol.

Mr. BELL.—Q. That is where you testify the steam tug left the barge “Energy” and after that she would take it up the river by a gasoline launch?

A. Yes.

Cross-examination.

Mr. HENGSTLER.—Q. Captain Bennett, have you been actively engaged as a Master mariner or a seaman in recent years? A. No, not directly.

Q. How long since you retired from the active business of seaman?

A. Well, I do not consider that I have retired, yet. I am acting yet as far as the handling of floating property is concerned.

Q. The land part largely you are doing?

A. No, I do some navigating at sea also.

Q. Actually navigate as a master mariner?

A. Indirectly, yes.

Q. Indirectly by engaging sea captains?

A. And inspecting them and so forth.

Q. But you don't work on board of ships now in the actual navigation of these ships, do you?

A. Well, no, the way you mean. In other words, you want to know whether I had command of a ship lately, is that it? [143]

Q. Yes, if you want to put it that way?

A. No, not since about '89.

Q. Not since '89? A. Yes.

Q. Have you navigated the waters of Napa Creek since '89? A. Yes.

Q. By personally running a boat? A. Yes.

(Testimony of James H. Bennett.)

Q. What kind of a boat?

A. A steam tug and gasoline launch.

Q. When did you navigate the steam tug on Napa Creek? A. About April of 1897—no, 1907,

Q. About April, 1907? A. Yes.

Q. How far did you go at that time?

A. I went up with the steam tug as far as Suscol.

Q. Have you ever gone up there on that river in any kind of a boat?

A. In any kind of a boat, yes.

Q. That you managed yourself?

A. Well, now, you confuse me, in managing and navigating; I did not manage her.

Q. That you navigated?

A. Yes, I have gone up as far as Napa.

Q. In what kind of a boat?

A. In a gasoline launch.

Q. That was the gasoline launch that you referred to a moment ago, was it?

A. I don't know if that was that particular one; it was one hired from Crowley for the purpose of sounding right up to Napa as to the depth of water if these barges went up there.

Q. Did you have anybody with you at the time?

A. Yes, sir.

Q. Anybody to help you in the navigation of the launch?

A. No, not in navigation, in taking the soundings. I was recording them and directing where I thought there was the most water.

Q. You did the navigating entirely yourself on that

(Testimony of James H. Bennett.)

occasion? A. I did, yes.

Q. Did you bring the launch down afterwards, or did somebody [144] else bring her down?

A. I left her at Suscol and took the train there.

Q. Did you ever go on down Napa Creek with anything in tow? A. Yes.

Q. With any vessel in tow? A. Yes.

Q. What did you have in tow?

A. I have gone up in the barge "Energy" and barge "Number Two" of the California Stevedoring & Ballast Company, barge "Number Two" when they were being towed up and down.

Q. You were on the barge? A. Yes.

Q. You were not on the launch? A. No.

Q. Somebody else was directing the navigation of the launch, I suppose? A. Yes.

Q. Both up and down? A. Yes.

Q. How far up did you go on those occasions?

A. On one or two occasions we went up above Lone Tree Bend, so called then.

Q. Lone Tree Bend? A. Above it.

Q. Above the Lone Tree Bend? A. Yes.

Q. And on which one of those two barges were you at that time?

A. Well, I am positive of the "Energy" going up there.

Q. You were on the "Energy"? A. Yes, sir.

Q. When was that, Captain?

A. That was May or June of 1907.

Q. That was then shortly after this accident, was it?

(Testimony of James H. Bennett.)

A. Yes. That is while I was on the barge. If I remember correctly I went up to sound before the American-Hawaiian barges went up there.

Q. You went up to sound before the accident happened that is in suit now? A. Yes.

Q. But when you were on the barge, that was afterwards? A. I think it was; yes.

Q. What did you do when you got to your destination just [145] above the Lone Tree Bend?

A. Loaded the barge.

Q. She went up empty, did she not?

A. Yes, sir.

Q. You left the barge there at that time?

A. No, I stayed right by the barge until she was loaded.

Q. Until she was loaded? A. Yes, sir.

Q. Then, did you go back in her?

A. I did, as far as Suscol.

Q. Was the barge at that time fully loaded, Captain?

A. Yes, it came down loaded from that reach above Lone Tree Bend to Suscol.

Q. Was there a house on the deck of the barge?

A. Yes, there was—it has a house; the engines are covered all over with a house temporarily.

Q. Covered over with a house? A. Yes.

Q. Was there more than one house on the deck of that house? A. Only one.

Q. Were you in that house? A. No, sir.

Q. Where were you?

A. Well, I was on deck and aboard the dredger and

(Testimony of James H. Bennett.)

aboard the gasoline launch, not any one particular place.

Q. When she was fully loaded was there room enough to walk around the barge? A. Oh, yes.

Q. Where? Along the edge?

A. The top of the gravel and each side of the corals that held the gravel and each end.

Q. You walked around on the top of the gravel?

A. On top and on each side of that, you might call it a box that was built to hold the gravel on deck.

Q. Now, do you remember what time of day you left that barge, left the place where she was loaded?

A. Well, I cannot tell. I remember that we arrived at Suscol about half an hour before the train comes by there, and I think the train goes by there about 8:30 in the morning.

Q. About 8:30 in the morning? A. Yes. [146]

Q. You don't remember, how long it took you to go down from there?

A. About a couple of hours, probably.

Q. What time of the year was that?

A. I think May.

Q. This was in the daytime, was it not?

A. Yes, it was daylight, but it was very hazy that morning, tule fogs arose from the side of the banks.

Q. You had nothing to do with the management or the navigation or the arrangement of the barge?

A. I did.

Q. What did you have to do?

A. Well, I was there to direct it. It was the first time the barge went that far up; I wanted to see

(Testimony of James H. Bennett.)

whether the man that was handling the launch was competent in my judgment; it was not necessary for me to direct him, but I was there to direct him if in my opinion and judgment he was not doing right.

Q. You appreciated the fact that it was pretty critical business to take that launch up there and around the bend?

A. No, I did not worry over it any.

Q. Nevertheless you were aware of the fact that it took skill to do it?

A. Not, not that so much; it was something new and I wanted to know naturally, running the business, you want to know who your employees are and whether they are attending to business.

Q. You thought the man in charge of the launch was competent to do his job?

A. I did, yes. I thought so before I went up there, but I wanted to verify it by going up and seeing the way he handled the property myself.

Q. Who was he?

A. I cannot think of his name now.

Q. Did you come to the conclusion that he did his work competently after you had gotten down to the place where you went off?

A. Yes, I thought he was doing all right, that he was all right to do the work.

Q. But you gave him directions now and then as to what to do [147] with the launch?

A. No, I did not.

Q. Did you give him any directions at all?

A. No.

(Testimony of James H. Bennett.)

Q. Didn't you say awhile ago you did give him directions?

A. If I said that I was mistaken. I meant I was there to give him directions if it was necessary.

Q. You kept watching to see whether it would be necessary at any place to give him directions, did you not? A. Yes.

Q. And no occasion arose when you had to give him directions? A. Not that I remember of; no.

Q. Do you remember when you passed through Lone Tree Bend at the time—do you know where Lone Tree Bend is? A. Yes, sir.

Q. Do you remember when you passed through it with that launch, with that barge? A. Oh, yes.

Q. How was the tide at the time?

A. Well, it was—I should imagine it was about an hour or an hour and a quarter after high water.

Q. An hour or an hour and a quarter after high water you say? A. Yes.

Q. Did you notice whether the tide was rapid or otherwise—did you notice anything about the tide?

A. No, I did not; I did not see any difference there from any other part of Napa Creek.

Q. What is that?

A. I did not note any difference there than there was in any other part of Napa Creek.

Q. Where were you on that barge when you got to Lone Tree Bend; were you on top of the gravel or were you on top of the barge, do you remember?

A. I can't recall. Probably I was on top of the gravel; I am not positive, I don't remember.

(Testimony of James H. Bennett.)

Q. On one occasion you went up the river with a tug; what steam tug was that?

A. The "Sea Prince." I went up previous to the time that the barge "Energy" went up. I hired the tug "Sea Prince" from the towboat company in order to dredge from the oil wharf above Vallejo,—not to dredge but to sound, [148] right up to Suscol; there was more or less of difficulty in entering what is called the new bridge proper. There is two forks and sediment spreads and it shows, and I went up there and took the Captain of the towboat with me, so that if we did any drawing—I did this in order to sound where there was the most water in the entrance and up as far as Suscol.

Q. That is all right, Captain. Let us go back a moment to the launch on which you went up. What were her dimensions, do you remember?

A. No, I should imagine it was about between 20 and 25 feet long.

Q. Between 20 and 25 feet long?

A. Yes, I should imagine so; probably not over 20.

Q. What were the dimensions of the barge or lighter? A. I think she is 159 feet long.

Q. 159 feet long? A. About.

Q. What is her name, did you say?

A. The "Energy." She is about 41 feet wide and I think she has about 12 foot depth of hold; she draws about 10 feet of water when loaded.

Q. How long?

A. About 159 feet if I remember correctly.

Q. And this particular occasion was the first one

(Testimony of James H. Bennett.)

when she had been as high up in Napa Creek as you speak of? A. Yes.

Q. How far had she been before?

A. This is the first time she went up.

Q. This is the first time you went up. What was the other barge that you named that went higher than the Lone Tree Bend?

A. Barge "Number Two" went up a few times.

Q. Did she go up with a launch or with a steam tug?

A. The steam tug cannot go any farther than Suisun col.

Q. Are you sure about that, that a steam tug cannot?

A. It might go on top of high water; it is all according to the depth of water, of course.

Q. Isn't it a fact that a steam tug can go as far as Napa and [149] that a good many steam tugs have gone up as far as Napa?

A. What do you mean by steam tugs? A little bit of a tugboat, anything that is propelled by steam, regardless of its size?

Q. No, let us say 100 horse-power, a steam tug of 100 horse-power, isn't it a fact they have gone as far as Napa?

A. Probably if they are flat-bottomed, yes.

Q. It is simply a question of picking the right tide, isn't it?

A. Well, on extreme high water probably you could get up as far as Napa, drawing about 10 feet of water.

Q. There are plenty of steam tugs that do that?

(Testimony of James H. Bennett.)

A. Yes, but they are not 100 horse-power.

Q. Aren't there steam tugs of 100 horse-power with a draught such that they can get up to Napa City, if they pick the tide?

A. Well, if they are built for that purpose, a flat bottom, yes, but the ordinary steam tug of 100 horse-power or more cannot hardly get up there unless it was a very high tide.

Q. Well, if it is the very highest tide, you are not willing to say that any steam tug of 100 horse-power could not go to Napa City?

A. I am telling you it is all according to the construction; if they are flat-bottomed they would go up; the ordinary tug draws about 10 to 12 feet of water in order to have a hold in the water so that they can do the pulling, they would not be able to get up there.

Q. In other words if their draught is not too deep they can get up there. If they are so large and exceptionally deep draught that they might get caught at low tide, they could not get up; is that it?

A. There is very few of them that will go up at low tide.

Q. Even at low tide some of them go up there, don't they? A. I don't know of any.

Q. But between low and high tide there are numerous tugs around [150] here that go up as high as Napa City? A. I don't know of any.

Q. You don't know of any?

A. You say there are numerous tugs. Do you know of any?

Q. Well, I am asking you, Captain?

(Testimony of James H. Bennett.)

A. I don't know of any.

Q. I would like to know your opinion?

A. I don't know of any that is rated as a tug.

Q. You don't know of any tug of 100 horse-power, that has ever gone to Napa City, do you?

A. Not that I know of.

Q. Not that you know of? A. No.

Q. Do you mean to deny that a tug, a steam tug of 100 horse-power cannot get as high in Napa River as Napa City?

A. Well, if we will confine ourselves to the depth or draught of the water, I think I have told you that there is no trouble for a tug of 100 or 200 horse-power provided she is built particularly for navigating shallow water, that there would be no trouble.

Q. Aren't there such tugs built for the purpose of navigating shallow water?

A. I don't know of any that go under the name of tugs, and that are used for tugboats, unless they are stern-wheelers; there are stern-wheeler tugs built to go up the river and navigate in about 4 feet of water.

Q. What name do they go under if they are built sufficiently shallow, if they do not go under the name of tugs—what do they call them?

Q. There are steam launches, are there?

A. Yes.

Q. There are launches that have a greater horse-power than 50 that can't get up to Napa City?

A. I don't know of any.

Q. You don't know of any? A. No.

Q. You don't mean to say that there are none?

(Testimony of James H. Bennett.)

A. I don't deny that there are.

Q. What?

A. I don't deny that there are. [151]

Q. You don't deny that there are steam tugs of 100 horse-power that can't get up to Napa City, do you, on this bay?

A. I don't know of any; there may be some, but I don't know of any.

Q. I am not asking whether you do, but you don't deny that there are, do you?

A. I don't deny that they could be built to go up there.

Q. I want to know the fact, Captain?

A. That is what I am getting at.

Q. Your opinion is that there is no trouble in navigating that creek with one of these launches of 50 horse-power, around these bends like Horseshoe Bend and Lone Tree Bend and some of the other bends there?

A. Well, yes, there is always trouble in getting around a bend, it don't matter whether it is Horseshoe Bend or any other bend.

Q. That is right.

A. There is always more or less trouble; you must use some precautions in making your turns.

Q. There is less trouble, however, if you have a more powerful launch than there is if you have a launch of small power?

A. That depends entirely as to their draught of water; you might have a very powerful tug, you would have to keep in the center of the channel, and

(Testimony of James H. Bennett.)

you could not snub, as we call it, on one side, in case your tow was to make a sheer; for instance, if you had a deep powerful tug, you would have to keep right in the middle of the channel; on the other hand if you had a tug of less draught you could shoot across and snub, which, in my opinion, is much more safe than a more powerful towboat would be.

Q. But the depth, the draught—the power and the draught, those are two independent things, aren't they?

A. It is very hard to get big power and a light draught.

Q. But it is possible, is it not? [152]

A. Yes, it is possible, but it is not practicable; as a general rule it is not used, it is too expensive.

Q. That is what I thought, that it was expensive, from the point of view of the person that uses these things in his business that he will spend no more than he has to?

A. For the reason that there is no commerce to justify a man investing the amount that would be necessary to put 100 horse-power or 150 horse-power in a flat-bottom boat; there would not be call enough for her to keep her employed.

Q. Captain, did you say that there is no trouble at Napa Creek with the arrangement that you have described, with that large barge and comparatively small launch? A. Yes.

Q. Your opinion is not based upon actual experience in navigating with that kind of an arrangement,

(Testimony of James H. Bennett.)

but it is based entirely upon your theoretical views, is it not?

A. Well, from the standpoint of a man that has watched it for a number of months and been closely identified with it; in other words, the man that pays the bills and wants to see that the work was done properly.

Q. You did your watching from your office in San Francisco? A. No, from right up Napa Creek.

Q. From right up Napa Creek? A. Yes.

Q. Have you done that frequently for the purpose of watching the navigation?

A. Yes, a week at a time.

Q. A week at a time? A. Yes.

Q. Stayed there on the spot?

A. Not on the spot; I kept moving from one place to another, from Suscol to the farthest reach where we were working, operating there, operating the dredgers up there and barges and gasoline launches.

Q. You were yourself in the business of operating barges at that time? A. Yes, sir.

Q. How long was that?

A. Well, we operated them about 7 or [153] 8 months.

Q. How long ago, Captain?

A. From about April, 1907, on to about August or September, I have forgotten which it was.

Q. Right up the same year as this accident happened? A. Yes.

Q. Just a few months during that summer?

A. A few months.

(Testimony of James H. Bennett.)

Q. Just a few months during that summer?

A. The best part of the year, seven months.

Q. Some seven months? A. Yes.

Q. Up to August of that year? A. Yes.

Q. You said from April to August of that year?

A. August or September, along there.

Q. Do you know the size of the American-Hawaiian lighter "Number One"?

A. Yes, they are both, "Number One" and "Number Two," sister lighters.

Q. What would you call a proper load for her of gravel?

A. Well, I have known her to be loaded with about 675 tons, not with gravel, but in the bay here with railroad iron and other materials, between six and 700 tons.

Q. Can you transform into cubic yards of gravel the calculation which you have given?

A. I am not much of a mathematician.

Q. You don't know how many tons 100 cubic yards of gravel is?

A. I figure ordinarily about a ton and an eighth to the yard, it is all according to the gravel being dry, how much water there is.

Q. A ton is how many cubic yards?

A. About a ton and an eighth to a ton and a quarter to the cubic yard; that is a rough figure.

Q. Captain, do you know the comparative difficulty of sailing down Napa River at ebb tide compared with sailing down with the flood?

A. Well, from my own experience as a practical

(Testimony of James H. Bennett.)

man, [154] I would prefer to come down on the ebb tide, provided it was not just a rush of the ebb.

Q. You think that the rush of the ebb would make some of these places and bends dangerous, do you not, Captain?

A. Well, not dangerous, but probably it would be a little more difficult to navigate.

Q. More difficult to navigate; it would be a dangerous place for an inexperienced man, would it not?

A. Well, I suppose man, an inexperienced man.

Q. It would be dangerous, would it not, for him to navigate—

A. (Intg.) It is all according to where he is navigating.

Q. (Continuing.) —in the rush of the ebb tide?

A. There are certain streams which are much more safe to navigate while the tide is at the strongest ebb or flood, owing to the high banks, and the water receding from the banks, you cannot go ashore, you will keep right in the center of the channel.

Q. But this is not that kind of a stream, is it, Napa Creek?

A. No, it is low land, impossible for the tide to have much of a rush or much velocity coming down Napa Creek owing to the low land; no high lands contain the water, it spreads over the low lands; it looks more like a lake than a river.

Q. Do you think any man who is familiar with the waters of Napa Creek around Horseshoe Bend, can get around that bend without danger if he is perfectly familiar with the locality?

(Testimony of James H. Bennett.)

A. It is all according—provided he does not meet with any accident, he should.

Q. What kind of an accident is he likely to meet there?

A. Of course, you understand—for instance, it is impossible to figure the eddies or currents; they have an eddy to-day at a certain stage of the tide and not have it to-morrow, and if you have it to-morrow it will be in another place in the [155] channel; and then there always is the danger of floating obstructions, not only in bends but in reaches as well.

Q. That danger would be increased in the night-time, would it not?

A. Well, I don't know as it would; I don't see why it should; as long as it is clear I don't see why it should be increased.

Q. As long as you can see a distance ahead?

A. Yes.

Q. Well, now, in a very dark night, supposing you say at new moon, no moon at all, wouldn't it be dangerous to navigate there on account of the obstructions that you might meet?

A. Any stars—are the stars out?

Q. Yes, let us say the stars are out?

A. If it is a starry night I don't know any danger.

Q. Do you think that makes much difference, the starlight? A. No.

Q. Enough difference to see ahead?

A. As long as you can see ahead 100 or 150 feet, because you are coming down slowly; it is not as though you were coming down with a rush of speed.

(Testimony of James H. Bennett.)

Q. Whether you can tell that was a bend, you have never had actual experience in observing in coming down this river or any other river, and in approaching a bend you observe that with your own eyes that the bank was coming in a dark night?

A. Well, the general rule in all rivers and creeks you find wherever there is a bend the land is a little higher there; there is a swirling of the water; there seems to be an accumulation; you can see the high land; wherever you see a sharp reach that is high land, much higher than in a straight reach.

Q. That is not invariably so, is it?

A. Pretty nearly in all cases of rivers that I ever saw, and creeks.

Q. There might be high lands right along a straight stretch, [156] might there not?

A. Oh, there can be, yes.

Q. So that the high land alone would not indicate to you that there is a curve there?

A. Well, it does; along the western rivers here and western sloughs, creeks you may call them, nearly every bend has a little high land.

Q. So you would think it makes no difference that the danger would be increased by the fact that there is a dark night, do you?

A. If it is a clear night, no, I do not think so—if it is a clear night.

Q. Well, I say a dark night; a night when there is no moon shining?

A. Well, how far can you see? If you can see

(Testimony of James H. Bennett.)

from 180 to 200 feet I do not think there would be any danger.

Q. Do you think, Captain, that anybody could see from 180 to 200 feet on a night when there is no moon, nothing but starlight? A. Yes.

Q. You do? A. Yes.

Q. And that is the reason why you would say that on such a night there is no greater danger in going around a bend in Napa Creek, for instance, than there is at any other time?

A. No, as long as you can see from 180 to 200 feet.

Q. Supposing, Captain, this man who was in charge of the launch and barge in this case had left the starting place four hours before he got to Horseshoe Bend or to Lone Tree Bend, more correctly speaking—

Mr. DENMAN.—How many hours?

Mr. HENGSTLER.—I say suppose he had left four hours before.

Q. (Continuing.) How would he encounter the condition at Horseshoe Bend, would it be dangerous or would it be normal?

A. What was the stage of the tide at the point of departure?

Q. Had he left at high tide?

A. Was it what we call small high water or large high water? [157]

Q. Well, let us say large high water?

A. Well, at the time he got to Lone Tree Bend it would be very swift ebb tide, that is, for Napa Creek, probably be running a mile and a half an hour, a mile

(Testimony of James H. Bennett.)

or a mile and a half at the most.

Q. A mile and a half an hour. It might be more than that, might it not?

Mr. BELL.—You do not claim there is any testimony in this case that he took four hours to reach that bend, do you?

Mr. HENGSTLER.—Yes, I claim that there is testimony; I claim that the deposition that you read this morning states that he left the loading place at Asylum wharf, at 10 o'clock at night and then he arrived there at 2 o'clock in the morning.

Mr. BELL.—You may be right about that, but that is not my recollection of it.

Mr. DENMAN.—I think you are in error about that.

The COURT.—Proceed with the examination of this witness.

Mr. HENGSTLER.—Q. You don't know whether Latimore, the man in charge of the barge, was instructed by the Napa Gravel Company when to leave with his barge, at what time to leave with this barge?

A. No, sir.

Q. Mr. Bennett, you are a member of the firm of Bennett & Goodall, the respondent in this case, are you not? A. Yes.

Q. What is the firm, a corporation? A. Yes.

The COURT.—We will take a recess now until to-morrow morning.

(An adjournment was here taken until to-morrow, Friday, January 12th, 1912, at 10 A. M.) [158]

(Testimony of James H. Bennett.)

Friday, January 12th, 1912.

JAMES H. BENNETT, redirect examination.

Mr. DENMAN.—Q. Captain Bennett, as I understand it you visited the locality of the wreck the day after it occurred? A. Yes, sir.

Q. And examined the scow? A. Yes, sir.

Q. What had happened to her when you saw her? What was her condition?

A. She had entirely collapsed, that is one side was down, and the other was up, entirely collapsed.

Q. The deck was collapsing on the bottom?

A. Well, the deck was out; say this was the side of the barge, the deck was just like that. (Illustrating.)

The COURT.—Q. Was she lying head on, or side ways? A. She was side ways.

Q. Up on the beach? A. Up on the bank.

Mr. DENMAN.—Q. The gravel of course was off her at that time? A. Nearly all of it; yes.

Q. I forgot to ask you whether you ever had an experience in towing yourself, Captain?

A. Yes, sir, in my young days I had considerable experience in towboats.

Q. How many years? A. About 6 years.

Q. About 6 years? A. Yes, sir.

Q. That was on the Australian Coast, was it not?

A. Yes, sir.

Q. When did you say your last command was on this coast as a master? A. I think it was in 1898.

Q. What position were you occupying?

A. Master.

(Testimony of James H. Bennett.)

Q. What position were you occupying in the Pacific Coast Steamship Company at that time?

A. Marine superintendent.

Mr. HENGSTLER.—I object to the question. I do not remember [159] that the evidence shows that he ever occupied a position in the Pacific Coast Steamship Company.

Mr. DENMAN.—Q. Did you ever occupy a position in the Pacific Coast Steamship Company?

A. I did.

Q. How many years?

A. I was altogether about 16 years with them.

Q. What position did you hold?

A. For 12 years I was marine superintendent and director of operations.

Q. From time to time you commanded vessels as you were short of captains?

A. From time to time when they were short I jumped aboard and took a trip, particularly during the time of the Alaskan rush.

Recross-examination.

Mr. HENGSTLER.—Q. Captain, what time of the day Captain, after the barge went on the bank in Napa Creek were you on the scene?

A. The following morning.

Q. The following morning? A. Yes, sir.

Q. At what time; or what hour?

A. About 8 o'clock.

Q. About 8 o'clock? A. Yes, sir.

Q. And you say she had then collapsed?

A. Yes, sir.

(Testimony of James H. Bennett.)

Q. Do you know when she collapsed?

A. I do not.

Q. You do not know how much time elapsed between the time when she went on the bank, and the time when she collapsed, do you?

A. No, sir.

Q. Do you not know if there was a tide between, or whether she collapsed as soon as she went on the bank?

Mr. DENMAN.—Q. Of your own knowledge?

Mr. HENGSTLER.—Q. Of your own knowledge?

A. Yes, of my own knowledge there was a tide between. There is a low water which follows the tide; no doubt she collapsed at low water.

Q. That would mean several hours during which she was on the [160] bank before she collapsed?

A. That I could not tell you, when she collapsed, on the first of the ebb or the last of it.

The COURT.—Q. How far was she lying below the Reef?

A. I should imagine she was possibly 700 or 800 feet.

Q. Was she around the bend?

A. Yes, sir, she had gone by the reef.

Q. Was the reef just at the bend or above?

A. It was above the bend.

Q. She had gone beyond the reef and around the bend? A. Yes, sir.

Mr. HENGSTLER.—Q. You know of your own knowledge, do you, Captain Bennett, that some time had passed between the time she went on the bank and

(Testimony of James H. Bennett.)

the time when she collapsed?

A. Well, no. I don't know it outside of my experience. My judgment would be that she did not collapse immediately she took the bank.

Q. She did not collapse immediately? How long after that, according to your judgment would she collapse—in your judgment?

A. I don't know; I could not tell.

Q. Have you any opinion about it?

A. It would be very hard for me to tell unless I was there at the time.

Q. Now, is there any way in which the barge could have been saved after she went on the bank, saved from collapsing?

A. Well, no, not up there I don't think.

Q. Were there any guards around the barge to keep the gravel from falling off?

A. Yes, sir, there was what we call corrals—side-boards.

Q. How high were those corrals?

A. I think they were about 3 feet 6, if I remember right.

Q. 3 feet 6? A. Yes, sir. [161]

Q. Are they permanent parts of the barge or simply fitted on loosely?

A. They were put on for the special purpose—for the gravel carrying purpose.

Q. They are very easily removed, are they not?

A. No, sir, they were bolted down.

Q. They were bolted down? A. Yes, sir.

Q. What were they made of? A. Wood.

(Testimony of James H. Bennett.)

Q. A hole could be knocked into any of them with an axe or any instrument?

A. No, sir, they were about 3-inch planking.

Q. Still you do not mean to say they could not be removed by a man? A. Not by one man; no.

Q. How many men would it take? I do not mean all of them, but a hole knocked into it. How many men would it take to do that, or to **remove one of the** planks so as to leave a hole?

A. One plank would not do you much good. You would have to remove really the entire side.

Q. You would have to remove the entire side?

A. Yes, sir.

Q. How many men would it take to do that?

A. It is all according to how quickly you would want it done.

Q. How quickly? Could it be done at all by two men, in your opinion?

A. Yes, sir, they could remove some possibly if they had the necessary tools, **monkey wrenches, saws and axes.**

Q. Is it not a fact that one man could easily remove the entire side if he had the proper tools?

A. He may do it, yes, in a week or so.

Q. In a week or so? A. Yes, sir.

Q. You don't think he could do it in half an hour?

A. No, sir, it is impossible.

Q. He could remove part of it in half an hour?

A. He might withdraw some of the bolts in half an hour, one or two of them.

Q. He might remove part in half an hour? [162]

(Testimony of James H. Bennett.)

A. Yes, sir. That is, he could remove some of the bolts. It would be necessary to take the bolts out before you could remove it.

Q. You don't think he could knock it down with an axe or knock a hole in it?

A. No, sir, because the gravel is against it on one side. It would be next to impossible. If the barge is empty so that they could work both sides one man might accomplish something. Take the barge loaded with gravel and the gravel is against the inside of the board it would be next to impossible for one man to accomplish anything.

Q. If, however, a hole had been knocked in the side, or part of the side had been removed, the gravel would have slid off, would it not?

A. Very little of it.

Q. Very little of it? A. Yes, sir.

Q. It would have prevented the lighter from collapsing, would it not?

A. If you had removed the entire weight possibly it would.

Q. If you had removed the entire weight?

A. Yes, sir.

Q. If you had not removed the entire weight it would not have prevented it from collapsing?

A. I don't think it would.

Q. If you had removed nine-tenths of the weight the barge would still have collapsed?

A. Nine-tenths?

Q. Yes.

A. I don't think she would, not with nine-tenths.

(Testimony of James H. Bennett.)

Q. If you had removed three-quarters, she would have collapsed would she not?

A. That is a question that you would have to go into her strength, the way she was braced *et cetera*. That is a question of figures. I am not in a position to tell you now as to the amount of gravel that would be necessary to move before she would not collapse. Her construction has a great deal to do with that.

Q. You are willing to admit, are you not that if the people [163] who were on the scene at the time she went ashore had removed the gravel or a part of the gravel, the greater part of the gravel, that would have eased the barge and it would have been a natural thing to do to save her. You admit that, don't you, or what is your opinion?

A. I do not understand that question.

Q. Would it not have been a natural thing for the Captain of the launch or anybody else who was present at the time when the launch went ashore to remove the gravel or as much of the gravel as they could?

A. If they had the proper implements I suppose they might have tried to do that. It would be necessary to have a lot of picks and shovels to do so and remove the side boards.

Q. That would have saved it from collapsing, would it not?

A. If the entire cargo of gravel had been taken off her I think it would possibly.

Q. Only however if the entire cargo had been taken off?

(Testimony of James H. Bennett.)

A. I think so; that is within a very small percentage of it.

Q. That is your honest opinion, is it?

A. It is according to the angle that the barge laid after the tide left her.

Q. When you saw the barge that morning she was sloping down towards the middle of the creek, was she not?

A. Yes, sir, she was sloping towards the opposite shore.

Q. Would that have any influence on the question of removing the gravel from her—on the difficulty of removing the gravel? A. No, sir, I don't think so.

Q. It would have been just as hard to remove it as if she had been level in your opinion?

A. No, sir.

Q. It would not have been so hard? A. No, sir.

Q. Would it have been easier? A. Certainly.

Q. That is why I ask. It would have been easier to have removed the gravel, would it not?

A. Yes, sir. [164]

Q. Because she was sloping?

A. That is after she took the ground she did slope, the question is whether she did not collapse before she took an angle that it would be necessary to remove the gravel.

Q. From the way that she was located when you saw her on the following morning you could not tell whether she had been sloping towards the opposite shore as soon as she got ashore, could you?

A. I could not.

(Testimony of James H. Bennett.)

The COURT.—Q. What is the variation of the tide at that point?

A. About 6 hours; you mean the height?

Q. The height?

A. Between 5 and 6 feet. And high water large or low water large there is more running out and more running in. It makes a difference of about a foot or a foot and a half.

Mr. HENGSTLER.—Q. What month of the year did that happen?

A. Well, I think it was April; some four years ago. I am not positive but I think it was in April. It was in the spring of the year.

Q. It was in the spring of the year?

A. Yes, sir.

Q. At that time of the year the tide varies more than it does at other times? A. It does not.

Q. It varies more than it does at other times?

A. No, sir, unless there is local influence such as freshets or something like that.

Q. Is not that local influence present in the spring of the year invariably?

A. No, sir, I think the freshets come more round May and June.

Q. But there are some ordinarily in April, are there not?

A. Sometimes. It is all according to the season we have had. If there is much snow in the mountains.

Q. That would make a difference would it not, also, in the rapidity of the tide?

(Testimony of James H. Bennett.)

A. Where, in the bay or in Napa Creek? [165]

Q. In Napa Creek, it would not make any difference there? A. No, sir.

Q. It would not make the ebb run out swifter if there are freshets?

A. Very little difference. You have no high land for your water. If you have any kind of a freshet it looks more like a lake than a creek owing to the low land being flooded.

Q. Are you speaking of the lower part of the creek?

A. I am speaking of the entire Napa Creek from the break up.

Q. Are you speaking of the stretch between Car Bend and Suscol? Or between Horseshoe Bend and Suscol?

A. I am speaking of the creek as a whole from Napa down. There is a very little difference in the banks of the creek. They are all about the same.

Q. You mean to say that the spring freshets have no influence upon the swiftness of the tide in Napa Creek, do you? A. It has a little, certainly.

Further Redirect Examination.

Mr. DENMAN.—Q. You were up there the next day and the day after, weren't you, or was it only the next day? A. Yes, sir; the following morning.

Q. Were there any freshets present in the stream at that time? A. I did not notice any, no.

Q. Did you notice any extraordinary condition of the tide or water there? A. No, sir.

Q. Was there a flood over on the banks, or was it

(Testimony of James H. Bennett.)

confined to the stream?

A. There was a little water above the banks in some parts of the creek. I remember I had to wade through considerable water to get to the barge.

Q. You did? A. Yes, sir.

Q. Would you say that the creek was in a condition of freshet? [166]

A. No, sir, it was about a normal state at high water.

Q. As I understand it, when that barge went on shore the men had the choice of either pulling off those sides, letting out that gravel with such implements as they could find or repairing the launch and trying to pull it off as a whole?

A. Naturally they would try to pull her off.

Q. That was the choice they had to make at that time? A. I so understand it.

Q. With the weight of the gravel sagging against the side down the stream or in the stream, would it make it more or less difficult to get at those boards for the purpose of removing them?

A. More difficult.

Q. If that side was in the water submerged at the angle it was in would it be more or less difficult?

A. Certainly.

Q. More difficult? A. Yes, sir.

Mr. HENGSTLER.—The angle he was in. I would object to that. He said he did not know if it was an angle or not.

Mr. DENMAN.—Q. I said if the angle made it in the water there would be the difficulty of discharg-

(Testimony of James H. Bennett.)

ing it to get the gravel off? A. Certainly.

Q. Do you think three men could have got that gravel off at one turn of the tide?

A. I don't think so.

Q. Without implements?

A. It would have been impossible to get it off without implements.

Mr. HENGSTLER.—Q. It would be possible with implements, would it not?

A. Yes, sir, it would. If you took time enough with three men you could do it in a couple of days probably.

Mr. DENMAN.—Q. What would be the implements to be used necessary for that?

A. First you would want a lot of screw-wrenches.

The COURT.—Q. Were these 3-inch boards bolted on to the stanchions? A. Yes, sir. [167]

Q. Not nailed?

A. Not nailed, no. You would want some screw-wrenches, and what we call top-malls, a big heavy hammer to drive the bolts through, saws and picks and shovels. That is about all I guess.

Mr. DENMAN.—Q. That is not a part of the usual equipment of tow launches of that type, is it?

A. No, sir. That is more of a contractor's equipment.

Further Cross-examination.

Mr. HENGSTLER.—Q. Don't you think that they are a necessary part of the equipment of a barge that is fully loaded, and that is being towed from place to place? A. No, sir.

(Testimony of James H. Bennett.)

Q. You do not foresee that an accident might happen which would necessitate the taking off of the load for the purpose of preventing an accident to the barge?

A. No, sir, I don't think it necessary. It is not the practice in the bay here or rivers, to carry such implements.

Q. Don't you think in your opinion ordinary prudence would make it necessary even if it is not the practice? A. No, sir.

Q. You do not think so? A. No, sir.

[Testimony of E. S. Pigott, for Respondent.]

E. S. PIGOTT, called for the respondent, sworn.

Mr. DENMAN.—Q. What is your occupation?

A. Master mariner.

Q. How long have you been a master mariner?

A. Since 1883.

Q. What class of vessels have you been on?

A. Both sail and steam.

Q. Are you in command of a ship now?

A. I am.

Q. What is it? A. A river steamer.

Q. Are you familiar with the waters of Napa Creek? A. Yes, sir.

Q. Been up and down that creek on many occasions? [168] A. About four years steady.

Q. What can you say as to the navigability of the creek, is it difficult or easy of navigation?

A. I don't consider it very difficult.

Q. How does it compare with the other creeks

(Testimony of E. S. Pigott.)

around the bay? A. I don't see much difference.

Mr. HENGSTLER.—I object to it. It does not appear that this witness knows anything about other parts of the bay and Napa Creek.

Mr. DENMAN.—Q. How long have you been sailing on the waters of the bay, Captain?

A. The waters of the bay of San Francisco and tributaries? Since 1902.

Q. That means practically all the tributaries of the bay? A. Pretty much all the tributaries.

Q. Constantly sailing there? A. Yes, sir.

Q. You have a small river steamer that you handle? A. Yes, sir.

Q. And it can make practically all the tributaries of the bay? A. Yes, sir.

Q. Been up Napa Creek? A. Yes, sir.

Q. Sonoma Creek? A. Yes, sir.

Q. Petaluma Creek? A. Yes, sir.

Q. Been to San Jose? A. Yes, sir.

Q. What creek do you have to go through to go to San Jose? A. You go by Alviso.

Q. How does that creek compare with Napa Creek?

A. I think—I am not very familiar with Alviso Creek but I think Napa Creek is much easier navigated than is Alviso Creek.

Q. You have sailed in and out amongst the islands of the river, delta islands? A. Yes, sir.

Q. Are you familiar with those narrow channels there? [169] A. Yes, sir.

Q. How do they compare with Napa Creek for navigability?

(Testimony of E. S. Pigott.)

Mr. HENGSTLER.—I object to the comparison between different creeks because it will lead into endless comparison and not one of them can possibly be like another one. There are always points of distinction, which I will be able to bring out.

Mr. DENMAN.—I want to show there is a very large traffic on these winding tidal creeks about the bay, and Napa Creek presents no special features of difficulty.

The COURT.—Ask the question.

Mr. DENMAN.—That is a fact, Captain, is it not?

A. That is a fact.

Q. Are you familiar with the strip of Napa Creek known as Horseshoe Bend? A. Yes, sir.

Q. Do you know where it is? A. Yes, sir.

Q. Have you sailed through there a number of times? A. Yes, sir.

Q. Now, what is the tidal difference between the Golden Gate and the upper portion of Napa Creek?

A. I should say about three hours, somewhere thereabouts.

Q. That is the calculation you have to make when you are going in?

A. The calculation of the setting tide, departing from Napa for us to get in high water coming down, we figure about three hours.

Q. So that if the high water at the Golden Gate was at 10:38 o'clock the high tide in the upper reach of Napa Creek would be 1:38? A. About that.

Q. Suppose it was high tide in the upper reach of Napa Creek at 1:38, what would you say about the ad-

(Testimony of E. S. Pigott.)

visability of passing down through the Horseshoe Bend with a barge in tow between [170] one and 2 o'clock on that morning?

A. The advisability of passing down between one and 2 o'clock?

Q. Yes, at that time. Suppose now, it is high tide in the upper reach of the creek at 1:38 and you are to take your barge through between one and 2 o'clock, what would you say as to that being a good or bad time of the tide to take it through?

A. I would think that was a very practicable time to take it through.

Q. That is a proper time to take it through, is it not? A. Yes, sir.

Q. As a matter of fact, suppose they waited for three hours after that, would you still think that the tide in that creek would be of a dangerous character to barge navigation?

A. Three hours after high water?

Q. Three hours after high water?

A. Would it be dangerous?

Q. Would it be dangerous to a man of fair skill to handle barge traffic there?

A. That would depend on the draught of the barge.

Q. On the draught of the barge? A. Entirely.

Q. Do you think the speed of the water would affect the danger to any considerable extent?

A. The current there is very sluggish. Unless there is a freshet in the river practically the current would not bother you. It is not swift enough. You do not have more than a mile current when there is

(Testimony of E. S. Pigott.)

not a freshet there at that particular place.

Q. Do you know anything about this barge that was wrecked up there? Did you ever see it there?

A. I have seen it there.

Q. Were you there near the time of the wreck?

[171] A. I was there just after the wreck.

Q. How long after?

A. I think probably 3 or 4 days.

Q. Was there a freshet in the creek at that time?

A. There was not, to the best of my knowledge.

Mr. HENGSTLER.—At what time?

Mr. DENMAN.—Q. At the time when you were there three days after?

A. I think 3 or 4 days after. I cannot say just how many days, but something like that,—something near 3 or 4 days or a week. Just how many days it was I cannot tell.

Q. Do you think a 50 horse-power launch would be strong enough to handle that barge with a load of gravel in that creek with proper tide conditions?

A. With the proper tide conditions I should say so.

Q. By proper tide conditions you mean with reference to the depth of the water? A. Yes, sir.

Q. Would such a launch be strong enough to handle her in an ordinary stream?

A. Outside of a freshet.

Q. Outside of a freshet. That is an indeterminate quantity anyway? A. Yes, sir.

Q. You cannot calculate your power for that in any event?

(Testimony of E. S. Pigott.)

A. They do not usually handle those kind of crafts in freshets on that river anyhow.

Q. Suppose you were to take a large enough tug to handle her in a freshet, what can you say about the size of such a tug for navigating in such a stream?

A. I don't quite catch your question.

Q. The larger your tug—

Mr. HENGSTLER.—Let him answer the question.

Mr. DENMAN.—He said he did not quite catch my question.

Q. Captain, as you increase the power of your tug you have to increase the draught to get holding power on your screw? [172]

A. You do in a screw boat as a rule.

Q. When you commence to increase your draught you diminish the radius of the usefullness of your tug, that is, you cannot snub her too close. You cannot get up close to the bank?

A. When you increase the size of the draught she is not so good for quick work in a narrow channel, for the simple reason you are close to the bottom and it takes you all the time to handle your own boat, much less in taking care of the tow that is behind you.

Q. That condition does not prevail in a shallow launch?

A. I would say in a shallow boat you have the better chance to take care of your tow than in a big one; nevertheless the big one has the most power, but the small boat you can swing out at right angles and keep your boat out of the bend and out of dangerous places where you cannot do it with a big boat.

(Testimony of E. S. Pigott.)

Mr. DENMAN.—Are you familiar with the tide-table, Mr. Hengstler?

Mr. HENGSTLER.—What is it you want?

Mr. DENMAN.—I want to show the high tide at the Golden Gate, and I will put that in evidence. The tide-table shows that on the 11th it was high tide at the Golden Gate at 23:10 o'clock. That is 20 minutes past 11. You are familiar with this I suppose?

Mr. HENGSTLER.—I do not admit this as being proper testimony or as showing the correct time. The purpose of this book is not to show the time of the tide, but the time is foretold. It is merely predicted.

Mr. DENMAN.—Then I will offer it in evidence. You will admit that the tide-table for the Pacific Coast of the United States, being the official publication of the Department of Commerce and Labor predicted that on the night of the 11th it [173] was high tide at 10 minutes past 11 at the Golden Gate.

Mr. HENGSTLER.—Predicted?

Mr. DENMAN.—Yes. And this record shows that prediction, and that on the previous night, on the night of the 10th the record shows that it was high tide at the Golden Gate at 22:36 o'clock, or 36 minutes after 10. There may be some question as to whether it is the 10th or 11th.

The COURT.—What is the tide-table on the 10th?

Mr. DENMAN.—On the 10th it was 10:36—22:36 on this notation—10:36. So that if there was a high

(Testimony of E. S. Pigott.)

tide at 10:36 at the Golden Gate, it would be about 1:36 in the upper regions of the creek.

Cross-examination.

Mr. HENGSTLER.—Q. Are you navigating on Napa Creek at the present time, Captain?

A. No, sir.

Q. How long is it since you have navigated there?

A. It has been about seven months.

Q. Seven months? A. Yes.

Q. About seven months?

A. Yes, sir, somewhere thereabouts.

Q. How long were you engaged in navigating there until you quit? A. About four years.

Q. About four years? A. Yes, sir.

Q. Had you ever been on Napa Creek before April, 1907? A. April, 1907?

Q. Yes. A. No, sir.

Q. You did not begin to know Napa Creek until after April, 1907, did you? A. No, sir.

Q. You have never been on Napa Creek until sometime after April, 1907, have you?

A. I think it was in April, 1907, that I first went there if I am not mistaken.

Q. It was in April, 1907? A. I think it was.

Q. That you first navigated there? A. Yes, sir.

[174]

Q. In what kind of a boat did you navigate in April, 1907, in a launch?

A. In a steamer. I was then in a steamer.

Q. A steamer? A. Yes, sir.

(Testimony of E. S. Pigott.)

Q. What steamer was it?

A. The steamer "Phoenix" and then I was on the steamer "St. Helena" which I commanded there for four years steady from that time on.

Q. You commanded her for four years?

A. Yes, sir.

Q. Have you ever towed any barge or lighter while you navigated on that creek? A. Up that creek?

Q. Up or down? A. Up?

Q. Either up or down; either up or down.

Q. No, sir, I don't think we towed only one barge while I was there on that river.

Q. What do you mean by "we"? I am asking you personally whether you personally did it?

A. I am answering you the best I know how.

Q. Answer again. Tell me whether you at any time had in tow a barge or lighter in Napa Creek?

A. I said we towed one barge while I was there.

Q. What do you mean by "we" Captain?

A. Towed it with a steamboat. I and others. It took more than me to do it. I could not do it alone.

Q. You towed her by means of what kind of a vessel at that time? You towed that barge by means of what vessel?

A. I towed her with the steamer "St. Helena."

Q. With the steamer "St. Helena"?

A. Yes, sir.

Q. Was it a large barge or a small barge?

A. It was a barge about 220 feet long I should say.

Q. 220 feet long?

A. I think something like that.

(Testimony of E. S. Pigott.)

Q. And about how wide?

A. I would say probably 40 or it may be 42. I cannot say just how wide.

Q. Do you know to whom that barge belonged?
[175]

A. To the Sacramento Transportation Company.

Q. Do you think that the Sacramento Transportation Company has a barge that is 220 feet long?

A. That is what I said.

Q. Did you tow her up or down the creek at that time? A. She was towed down.

Q. From where?

A. The launch towed her up and we towed her down with the steamer.

Q. From where did you tow her?

A. From Napa—from Napa to Vallejo.

Q. Do you think that a launch could have taken her down from Napa to Vallejo?

A. I certainly think so. The launch took her up.

Q. Do you think it makes any difference in the difficulty of towing as to whether you go up or down that creek?

A. It would not be in fine weather. Where there was no current, it would not make any material difference whether you were going up or down, if you had not any current to deal with.

Q. Do you remember when you left Napa City; at what stage of the tide? A. I do not.

Q. You do not remember?

A. No, sir, so long as there was water enough to float us we did not figure it.

(Testimony of E. S. Pigott.)

Q. That is all you cared for? A. Yes, sir.

Q. That you could float your steamer and barge. You did not have to take into consideration anything else, did you? A. No, sir.

Q. You have had no experience in towing in Napa Creek with a gasoline launch, have you?

A. I never towed with a gasoline launch in my life, and I know nothing about it.

Q. At the time when you towed that barge was she loaded?

A. She was partially loaded; she had a part of a load on.

Q. She was partially loaded? A. Yes, sir.
[176]

Q. Now, Captain, is it not a fact that Napa Creek has a greater number of sharp bends than most of the tributaries that you have navigated in around this bay?

A. No, sir. There are some of the tributaries that are much closer than Napa is.

Q. Some what?

A. Some of the tributaries to the bay have shorter bends in some places than Napa Creek has.

Q. Napa Creek however has numerous bends, has it not, that are very sharp? A. It has.

Q. How about Alviso Creek that you spoke of. Has that some sharp bends?

A. There are some sharp bends there, yes.

Q. How wide is Alviso Creek?

A. I could not say. I have no idea. That is a question I cannot answer.

(Testimony of E. S. Pigott.)

Q. You really do not know very much about Alviso Creek?

A. No, sir, I don't know much about it. I have been up it. That is all.

Q. Do you remember Lone Tree Bend, this particular place called Lone Tree Bend in Napa Creek?

A. Yes, sir, I do.

Q. What do you think with reference to the comparative difficulty of taking a large lighter like this lighter which went ashore, and which you saw ashore, if it had been taken down Napa Creek with a steam tug of 100 horse-power, I will say, instead of being taken down by a gasoline launch of 50 horse-power—which would have been the safer?

A. Well, I would say this in answer to that question that the light draught boat would be the safest boat to handle it with, because you could handle the light draught boat and get around and take care of your tow where you could not do it with a deep draught boat.

Q. Is that independent of what power that boat may have?

A. Your power would not be any good to you if your boat was on the bottom of the ground and you could not handle it. It would not make any difference how much power you had, it [177] would be no good to you.

Q. In your opinion a 25 horse-power gasoline launch would have been sufficient, would it, to take that barge down the creek?

A. In answer to that I will say that the 25 horse-

(Testimony of E. S. Pigott.)

power boat would be better than the 100 horse-power, if you could not handle it if it were aground. It would be worthless no matter how much power you had.

Q. If there was a competent man in charge of a steam tug of 100 horse-power, would you say that the barge is in that case no safer than it would be with a gasoline launch of 25 horse-power, with a competent man?

A. It does not make any difference how competent the man was. If his boat is aground she is useless. You cannot handle your tow with your boat aground.

Q. To prevent her going aground, which would be the safest, the tug with the 100 horse-power, or the gasoline launch with 25 horse-power?

A. If you had plenty of room, naturally you could do more towing with a boat that has big power—if you have plenty of room. If you have not got plenty of room you had better have the smaller power in a light draught boat where you can handle your tow.

Q. There is room enough in Napa Creek, is there not, for the boat of a larger power—for 100 horse-power boat?

A. It depends entirely on her draught, what she draws.

Q. I am speaking of Napa Creek. There is room enough, is there not, to take the boat of larger power, 100 horse-power up and down from Napa?

A. It depends entirely on the draught of the boat.

Q. If the draught is not too deep, as far as the room in the river is concerned, she can be taken up

(Testimony of E. S. Pigott.)

and down safely?

A. If the draught is not too great, yes.

Q. As far as the difficulty of negotiating Horseshoe Bend is [178] concerned, does the tide make any difference in coming down, does it make any difference at what time of the tide you get to Horseshoe Bend?

A. It makes this difference. If you have got water enough to float over there, of course, a high tide is better than a low tide—if you are not drawing too much water.

Q. But if you get there at low tide, does that increase the difficulty in going round Horseshoe Bend?

A. Naturally any place where there is shallow water you want all the water you can get. The more the better.

Q. If there is a falling tide as you get around, a rapidly falling tide, that would make it more difficult to negotiate that bend, would it not?

A. Not less you got stuck.

Q. You are more liable to get stuck at such a tide than at another tide, are you not?

Mr. DENMAN.—You mean a shallow tide?

Mr. HENGSTLER.—Q. A rapidly falling tide?

A. I do not quite understand.

Q. If you get to Horseshoe Bend with or without a tow, if you get to Horseshoe Bend at a rapidly flowing tide, it is more difficult to navigate there safely than it would be at high tide, is it not?

A. The low water rivers, naturally so.

Q. It is more difficult?

(Testimony of E. S. Pigott.)

A. Yes, sir, on low water.

Q. Would it make any difference whether you got there in the daytime or in the night-time?

A. No, sir.

Q. It would not make any difference?

A. We run the same day and night. We never stop for night.

Q. It is just as easy to get around at night as in the day? A. We make our runs the same.

Q. I have heard so, and you do so because it is just as easy, do you?

A. We do it because we do not tie up steamboats for [179] night. We never tie up steamboats for night. We work nights the same as day.

Q. Have you ever run aground with a steamboat in your experience? A. Yes, sir.

Q. It was always at those bends, was it not?

A. No, sir, not always at those bends. At most any place where there was not water enough to float you went aground.

Q. Have you ever gone aground with your steamer at Horseshoe Bend? A. Yes, sir.

Q. Have you ever gone aground at Lone Tree Bend? A. Yes, sir.

Q. It is not very unusual for steamers of the Napa Transportation Company to go aground at those bends, is it?

A. At any time when the tide is low enough they would go aground anywhere.

The COURT.—Q. You mean in the channel or on the bay?

(Testimony of E. S. Pigott.)

A. In the channel, when there is not water enough to float her.

Mr. HENGSTLER.—Q. It is therefore very important, then, is it not, to pick out the proper tide in which to get to these places, to these bends, in the proper state of the tide?

A. At any particular bend?

Q. Yes.

A. No, sir. They usually get on as soon as they can while there is water enough to go over it.

Q. Yes, you must have water enough to get over it?

A. Yes, sir.

Q. You stated, Captain, that the current at Lone Tree Bend would be great ordinarily?

A. Other than freshets, I should judge about a mile current; I don't think it is any more.

Q. You do not think it is any more?

A. I don't think so.

Q. Could it not be a mile and a half?

A. It could be, but I don't think so. [180]

Q. It could be two miles, could it not?

A. With freshets, yes.

Q. Outside of freshets, it could be two miles, could it not? A. I say I don't think so.

Q. It is possible, as far as you know, is it not, that it is two miles? A. No, sir, I said a mile.

Q. I want to know how nearly you know. You say yourself it might be a mile and a half?

A. I did not say a mile and a half; I said a mile.

Q. You say a mile in your opinion?

A. That is my opinion.

(Testimony of E. S. Pigott.)

Q. You do not mean to say that you actually know accurately that it is a mile?

A. I never measured it. That is my judgment.

Q. That is your judgment? A. Yes, sir.

Q. Does it ever get any more than a mile even outside of freshets?

A. I say I don't think so. I said a mile.

Q. However, during freshets, it is more, is it not, than a mile? A. Yes, sir.

Q. How great does the current in your opinion become at the season when the freshets are in the river?

A. What is that?

Q. How great is the current when there are freshets in the river?

A. Well, I think there are some parts of the river there where it is seven miles. It would be more or less.

Q. You consider navigation about these bends in the Napa River like the Lone Tree Bend more difficult with your own boat in a very dark night than it is at daylight?

A. Naturally we would like daylight. Daylight is easier, of course, but we never stop steamboats for night-time; we run on schedule just the same.

Q. Have you got a searchlight on your steamer?

[181] A. No, sir, not on that one.

Q. But not on that steamer? A. No, sir.

Q. But there are searchlights on some of the steamers of the company?

A. Yes, sir, on some of them.

[Testimony of Theodore A. Bell, for Respondent.]

THEODORE A. BELL, called for the respondent, sworn.

Mr. DENMAN.—Q. Mr. Bell, what connection did you have with the Napa Gravel & Material Company at the time of this disaster?

A. I was one of the organizers of that company and then became its secretary; I was the secretary at that time.

Q. Did you have occasion to visit this creek after the loss of this vessel?

A. I did not visit the place where the barge was wrecked.

Q. How soon after the wreck were you up in that vicinity?

A. I went to Napa from San Francisco the same day of the wreck, assuming that the wreck occurred at 2 in the morning, that same day in the afternoon I went to Napa.

Q. You heard of this then?

A. I heard of it before I left San Francisco.

Q. Does the railroad pass close by the creek as it goes up? A. Quite close.

Q. Was there any evidence of a freshet in the creek at that time? A. There was not.

Q. Now, do you know what load was being carried on this barge at that time?

A. There was 400, an even 400 cubic yards of gravel.

Q. That is a normal load for it, do you think?

A. Yes, the load before that it had carried 416 and

(Testimony of Theodore A. Bell.)

a fraction yards.

Q. Now, how long have you been engaged in the gravel business there? [182]

A. We had been operating these two barges about 10 days before this accident or wreck.

Q. How long have you been in the gravel business in that creek though?

A. Well, we really did not start our operations in earnest until we had concluded this charter with Goodall & Bennett; that was the latter part of March, during the last 2 or 3 days of March, and then we made our arrangements—I personally made the arrangements with Crowley to tow these boats, these barges up on the branches of the river and then we had our tugboat on the lower stretches of Napa River to bring the barges to San Francisco.

Q. Now, what were those arrangements, if any, with Mr. Crowley?

A. Well, I went to Vallejo to see Mr. Crowley and I forget who accompanied me, but we told him that we wanted him to tow the barges on the upper Napa River. We explained to him that we had the barges from Goodall & Bennett, what barges they were, and that we wanted a launch, wanted him to supply a launch, a proper launch, and that we wanted skilled men to handle the barges on the upper river to take them down to meet our tugboat on the bay, from Vallejo up to the wide stretches and deep water of the river.

Q. He agreed to do that?

A. He agreed to do that. We did not select any

(Testimony of Theodore A. Bell.)

particular launch, and we did not select any particular man. We told him what we wanted, the business we were, what barges we had, and asked him to supply the necessary launch and men to carry out our business for us, our operations.

Q. How long did you live at Napa?

A. Nearly all my life in Napa County, since 1876.

Q. How long has the gravel business or the business of pumpping gravel from that creek been carried on? [183]

A. To my personal knowledge, of course after I began to observe it, right after the fire in San Francisco, in April, 1906, I began to notice the business and observe it, and subsequently launched this with some friends, this company of our own.

Q. I mean to say how long has that business been conducted by anybody else there, how long have they been taking gravel out of the river?

A. I have seen them for many years.

Q. 20 years at least?

A. Ever since I have lived at Napa; I went to Napa in '92 to live, having lived in the upper part of Napa County prior to that time. I recall that for many years they took gravel out of the Napa River.

Q. What is the customary method?

A. I never observed that close enough to say.

Q. With steamers or barges?

A. I have seen both in the river, and sometimes what they call scow-schooners; I think they call them scows, and barges.

Q. Now, what can you say of Mr. Crowley as to

(Testimony of Theodore A. Bell.)

his competency in choosing crafts for that work?

Mr. HENGSTLER.—If your Honor please, I object to that upon the ground that it is irrelevant and incompetent; it is no part of the issues of the case at all, as to Mr. Crowley's competency.

Mr. DENMAN.—As I understand the issues in this case—

The COURT.—Let it go in under the objection.

A. Well, I had a deep personal interest in the leasing of these barges and in their proper handling, and in their being handled safely, because it took us some 10 days to close the charter with Goodall & Bennett, and we had put up a very large bond, and I became personally one of the bondsmen to the extent of \$5,000 with the American Bonding Company, so that I had deep personal interest in seeing that everything that we used [184] in the business was safe and proper and capable of handling the business; so I made inquiries, when we found that we needed a launch, because our tugboat was drawing 11 feet of water, and could take up the boats down from Suscol and bring them to the city, and I made inquiries to find who could supply us with the proper launch facilities to go up into the upper reaches, and I found that Crowley was the man. I went to Crowley because I thought and believed that he would supply a launch and a skilled man to handle these barges in the upper river.

Mr. DENMAN.—Q. As a result of your inquiry,—

A. (Intg.) As a result of my inquiry.

Q. As a matter of fact, he has the largest plant on

(Testimony of Theodore A. Bell.)

the bay? A. Yes, he has.

Q. Is there anybody in your board of directors or in the management of your company that is familiar with navigation?

A. Yes, I think at that time **Captain McNoble** was interested in our company, and he was then operating, and the master for the Napa Transportation Company, running one of their steamers at that time, I think, and subsequently became their manager at the San Francisco end of the Napa Transportation Company.

Q. Did he have anything to do with the management of the vessels up there or the management of the gravel business?

A. No, I think that his time was taken up with the Napa Transportation Company.

Q. Had nothing to do with dispatching of this particular boat?

A. No; this boat was loaded by a dredge that belonged to Mr. B. F. Durfee, who was in the gravel business on the river when we went to him to get his assistance in handling our business, to do our pumping; and at that time **Mr. Durfee's man, a gentleman** that I remember only by the name of Burgess who I think is now in Colorado—I have been trying to find him and I [185] understand he is in Colorado, he was in charge of the pumping, and one of the other men.

Q. And this man Latimore was in charge of the navigation and handling of the barges?

A. We had nothing directly to do with Latimore;

(Testimony of Theodore A. Bell.)

he was put on there by Crowley, and my recollection is we paid Crowley \$30 a day, although it might have been \$25 a day.

Q. By the way, do you want to testify in your own behalf?

A. I think I have said all I desire to say. Will you pardon me? I would like to say this, on behalf of the Napa Gravel & Material Company and the American Bonding Company, that before we took over these two barges from Goodall & Bennett, we met with Captain Bennett or Captain Goodall several times and they undertook to investigate the conditions upon the river, to go up there and ascertain whether it was prudent and wise to operate and it was only after that investigation and after they knew exactly what we wanted to use the barges for and where we were going to take them that they made the charter to us.

Mr. RAYMOND.—Q. In that connection was Crowley discussed as to the man to furnish the launches?

A. I think very likely that we did discuss that with Goodall & Bennett, because it was necessary to operate on the upper river with the launches and then with our tugboat on the lower river, on the lower stretches of the river.

Cross-examination.

Mr. HENGSTLER.—Q. Was anybody else discussed besides Mr. Crowley, Mr. Bell?

A. I don't think so.

Q. Isn't it a fact that nobody thinks of anybody

(Testimony of Theodore A. Bell.)

else except Mr. Crowley when you want a launch—everybody knows Crowley because he is practically the only launchman?

A. Well, he is the only man that I can recollect that we discussed, [186] that he was a man who could take care of the business.

Q. You did not ask anybody else except Mr. Crowley?

A. Well, I do not think anyone else was suggested, or that there was any thought of going to anyone else; they believed he was the man that had the proper launches and the proper men to handle this business for us.

Q. You say at the time when this lighter was wrecked, there were how many cubic yards of gravel on her? A. 400 even cubic yards.

Q. How do you know that, Mr. Bell?

A. Well, we had an arrangement with Mr. Durfee who was loading this barge and dispatching the barge, loading it and then sending it on its way, that every day we should get a statement from him on a form that was agreed upon as to the number of cubic yards loaded on these barges. He in turn arranged with us that this man should go from the dredge at night up to Napa and telephone from Napa from the Palace Hotel down to him at his home and tell him that night so that he would get the word that night and then the next day he would send us word. Now, those statements came to me at Napa and while I cannot find this particular statement, I do find a letter which reminds me, which refreshes my recollec-

(Testimony of Theodore A. Bell.)

tion, when I was asked by Mr. Cooper as to the number of cubic yards on this particular barge I looked up that statement and found that it had come just as the other statements had come to us, 400 even cubic yards; and then our books show that the load before that on Lighter "Number One" was 416 and I think two-tenths cubic yards. Now we had to know that exactly, for this reason, that we were paying Mr. Durfee a certain per cent, I think 36 per cent of what we got from the Emerson Gravel Company, and we were getting but 15 cents alongside the piers in San Francisco from the Emerson Gravel Company, so it became very necessary [187] for us to know exactly how much gravel was put on each barge, in order that we might settle with Mr. Durfee, or collect from the Emerson Gravel Company. Now, those things, you might say—I did not see it loaded—but it came through those—the statements came through the ordinary course of our arrangement and transaction of our business with Mr. Durfee.

Q. You simply know about that from what you were informed by Mr. Durfee and the different channels from which these statements came, that is all you know about it? A. Yes.

Q. You don't know that of your own personal knowledge?

A. No. I presume no other living person does have any personal knowledge of it; no one man could know about that.

Q. Not even the person who loaded that barge could testify to the amount of gravel that was loaded?

(Testimony of Theodore A. Bell.)

A. Well, possibly Mr. T. Burgess could.

Q. Where is Mr. Burgess?

A. M. T. Burgess it is. I made inquiry and I find that he is working either for the Moffat road, or the D. & R. G. in Colorado.

Q. In Colorado? A. Yes.

Q. When did you make that inquiry?

A. Well, I made that only a few days ago. I had forgotten about Mr. Durfee's dispatching this boat until I had written to one of my associates, former associate, and he reminded me of the transaction, and then I went into the books of the company, and then I found that Mr. Durfee had dispatched that boat and I immediately went to Mr. Durfee to find out if he could tell us where we could find the man Burgess, where he could be found, and I was informed he was not in the state.

Q. Do you know Mr. Bell, what the weight would be of 400 cubic yards of gravel?

A. Well, I am hardly able to testify as an expert, but we [188] always figured from a ton and an eighth to a ton and a quarter cubic yards. We subsequently went into the gravel business, sold gravel here in San Francisco, where you haul it by teams, and I think we used to figure on getting, yes, we used to figure on getting two cubic yards on a wagon down here, and we figured that was in the neighborhood of $2\frac{1}{2}$ tons; we used to figure about 2 cubic yards to a wagon hauled by two horses, here in San Francisco, so that it runs along about, I think, a ton and $\frac{1}{8}$ to a ton and $\frac{1}{4}$ a cubic yard.

(Testimony of Theodore A. Bell.)

Q. You don't know that from your experience, do you?

A. Well, I really do too, because I had to come down here frequently, and saw them loading their wagons from our bunkers in San Francisco; I went there personally and figured on the money end of it, how much you could get per wagon load hauled up, what it was worth and all those things.

Q. How did you determine the weight then, by simply looking at it?

A. Yes, and by the amount that a couple of horses could haul. I had some early experience in that line, so I could testify about team work.

Q. That is a pretty rough method of determining the weight, is it not, by looking at the load and knowing how much the horses could pull?

A. Well, we could come pretty nearly telling, once we looked at it. I have hauled lots of rock and I can haul lots of other things, and I can pretty nearly tell by the construction of the wagon and the horses pulling, about what is the capacity of it.

Q. Can you tell by looking at a horse how much it can pull?

A. I could not tell right down to the pound, but if I was going to buy a horse and wanted it for hauling purposes I could pretty nearly tell you.

Q. That would satisfy you, with reference to the method of determining the weight, from the amount that you saw? [189]

A. Not within a few pounds. I do not pretend to do that.

(Testimony of Theodore A. Bell.)

Q. Could you tell within a few pounds if you saw the load on a barge,—could you tell within a few pounds, the weight of it? A. No, I could not.

Q. All the experience which you had in this gravel business in Napa Creek was for about two weeks before this accident occurred, was it not, Mr. Bell?

A. Well, we were operating these two barges for about 10 days before this wreck. Now, whether we handled some gravel before that I cannot say, but I could tell from the books of the company that I have in my office, but I consider that we really went into the gravel business when we chartered these two barges and went to work.

Q. You mean at that time you went into the transportation of gravel business? A. Yes.

Q. You did not go into the actual gravel business at that time?

A. Well, I will tell you, we went into—the first barge of gravel that we moved out of there on our own responsibility, went out on April 2d, 1911.

Q. And this accident occurred on April 11th, 1907?

A. This accident occurred in the early morning of April 11th, 1907.

Q. How many loads, how many barges, if you know, were towed during that time, were towed upon the river? A. On those barges?

Q. Yes, in those nine days.

A. Well, I can tell I think exactly by looking at our books, but I think about 3 or 4, maybe 5.

(Testimony of Theodore A. Bell.)

Q. Now, you began at first to tow the gravel from points lower than Horseshoe Bend?

A. I don't know that except from what I have heard testified; I really don't know that.

Q. You don't know from what point the gravel was taken in the [190] river? A. No.

Q. Do you know whether or not it is a fact at this time when the accident occurred, when the launch took the lighter "Number One" or intended to take the lighter "Number One" down the river, that that was the first time when she started out at a point higher up in the river than Horseshoe Bend?

A. No, I don't know that, Mr. Hengstler, except what I have heard in court, I have never been informed on that.

Q. Now, this launchman got his instructions as to when to start, from the people who loaded the barge, did he not?

A. Yes, I think so, according to the arrangements that were made, that Mr. Burgess, who was doing the loading, dispatched him. I don't know but probably they consulted together. We had no arrangement of that kind with Mr. Crowley, as to who should be the judge or who should dispatch the boat; the boat has to go up there and do the work.

Q. When there was a boatload ready for him, he would start with it down the river, when he was notified?

A. He could not start until the barge was loaded, and then how soon he would start after that, I should say that was his matter, that he would use his judg-

(Testimony of Theodore A. Bell.)

ment about that; that was his business, the man in charge of the launch.

Q. You don't know about that, however; you don't know whether it was left to him or whether he was given instructions by anybody? A. No.

Q. Now, Mr. Bell, did you ever make any attempt to have Mr. Latimore, the man in charge of the launch, testify in this case?

A. I did not. I thought that you would have him here as a witness.

Q. What made you think I would have him here?

A. Because you had taken his deposition and I assumed you believed him to be a witness favorable to you. [191]

Q. You are a lawyer, are you not, Mr. Bell?

A. Yes.

Q. Would not the assumption be just the other way,—if I have his deposition why should I call him as a witness?

A. I thought you would call him as a witness in this jurisdiction and could be reached by process, that you had taken the deposition as a matter of precaution in case of his death or being beyond process of the Court, that you could use the deposition then.

Q. Do you know when that deposition was taken?

A. Oh, I think perhaps a year and a half ago.

Q. It was taken long after the matter was pending? A. Yes.

Q. Do you remember the reason why I took his deposition at the time?

(Testimony of Theodore A. Bell.)

A. You did not take me into your confidence in that respect.

Q. Didn't it appear as a fact in this deposition that Mr. Latimore was about to go to Honolulu, to leave this jurisdiction?

A. Oh, I think you did ask that question, yes.

Q. And it appeared, did it not, as a fact, that I called him for that reason, because he was going to leave the jurisdiction? A. Yes.

Q. Up to that time, you had made no attempt, had you, to take his testimony, you yourself? A. No.

Q. Never thought of it, of saving his testimony?

Mr. DENMAN.—I object to that question, what counsel thought of doing.

Mr. RAYMOND.—It certainly is not cross-examination.

The COURT.—Let it go in subject to the objection.

Mr. HENGSTLER.—Q. It never occurred to you that you should save his testimony as to the facts of the loss of this lighter, did it, Mr. Bell?

A. Well, I thought that—I acted on the assumption that if the case ever came to trial we would be able to show the circumstances under which the barge went [192] ashore, and I did not know that until you gave notice of taking the deposition—I don't know that I even knew that this man Latimore was the man that was on that launch—I did not give the matter a great deal of attention, to tell the truth.

Q. You did not care who was on the launch, did you?

(Testimony of Theodore A. Bell.)

A. Well, I did care, but I did not think—if you want an answer. I thought you would get your money out of the insurance company and the case never go to trial.

Q. That was the impression that you got?

A. And always has been my impression.

Q. You jumped at that conclusion, you had no real facts to sustain that opinion?

A. Oh, yes, I have the fact that you have got a policy and it has not been paid, and that my charter with Goodall & Bennett and my agreement with the bonding company provided that I nor the bonding company, nor the Napa Gravel & Material Company should be responsible for anything coverable by insurance, and I always assumed that that risk was preserved and that you could get your money if you attempted to, and that is the reason why I never made any serious attempts to get these witnesses or to hold them or to take their depositions.

Q. You took it for granted as one of the attorneys in this case even although it might be true that this business of towing was negligently managed, that it would not hurt you because the insurance company would have to pay the money; that is the reason, is it not, why you did not attempt to ascertain any of the facts?

A. Well, I concerned myself at first, went to Napa when I heard of this accident, made inquiries at that time—I don't know from whom, but I talked with all the people that had anything to do with the loading of the barge and its going ashore and all that,

(Testimony of Theodore A. Bell.)

and I came to the conclusion at that time, and I was vitally interested, that there was no negligence [193] of any kind there, and that the barge was insured, and I let it go at that.

Q. From whom did you inquire at the time, in Napa? A. I cannot recall that.

Mr. DENMAN.—I object to that; that has nothing to do with the case.

The COURT.—I do not think it makes any difference.

Mr. HENGSTLER.—It has a good deal to do about the case if your Honor please, because it will appear afterwards that the question as to whether, if negligence appears in the navigation in this case, the respondent is liable or is not liable is the chief question in the case.

The COURT.—Not as to who he made inquiries to ascertain the facts.

Mr. HENGSTLER.—Yes, your Honor. This is of material importance in this case. The only people who were present and know the facts in this case were in the employ of the respondent and they alone can know the facts; there was this man Latimore, and he testified that there was another man in his launch, and that there was a third man on the barge. Now, I want to show, if your Honor please, that he never inquired from Latimore as to the facts, and never inquired from the other two men as to the facts.

The COURT.—Ask him about that, then.

A. As soon as I got to Napa that night I got word

(Testimony of Theodore A. Bell.)

through, I think, Mr. Powers was my associate, or someone else, to the men that were on the dredge and the man that was on that barge, and at my Napa office—I then had an office in San Francisco and I had one in Napa and at my Napa office at night, my recollection is that I called in every man that knew anything about those facts and inquired about the circumstances of the loading and the time she went out, what was the condition of the tide, and [194] what happened there in Lone Tree Bend.

Mr. HENGSTLER.—Q. Did you call in this man Latimore?

A. I think so. The only way that I can recall Latimore is by the color of his hair. I think Latimore was there. When I saw him over at your office, when his deposition was taken, I thought he was the man that I called into my office. I did not know this man personally, but I had the man working with me that I sent to get them, and either the first night or the second night after this accident I had these men in my office at Napa.

Q. So you think now that you did ask Latimore about the circumstances of the stranding?

A. I am very sure that I did.

Q. Did you not say a little while ago that you had never seen him until you had seen him in my office when his deposition was taken?

A. Oh, no, if I said that I simply did not intend to do it, because I think that he was in my office at Napa on the first or second night after this wreck, and that I questioned him.

(Testimony of Theodore A. Bell.)

Q. Now, Mr. Bell, are you sure of that, that Latimore was there at that time?

A. No, I won't say for sure, but I believe he was; I think he was.

Q. Do you know what man was in the launch with Latimore on that occasion? A. No.

Q. You don't know? A. I don't know.

Q. Did you ever ask Latimore for his name?

A. No.

Q. You never did? A. No.

Q. Do you know what man was on the barge on the occasion when she went on the shore?

A. Well, I do now. I have looked through our vouchers, and I am now and have been making an earnest endeavor to find him, but I could not find him.

Q. When did you begin that endeavor to find him?

A. Well, a few days ago. [195]

Q. That was the first time that you endeavored to find him to find out the facts from him?

A. Yes. I want to explain, in answer to that, Mr. Hengstler, why I did not.

Q. Why you did not what? A. I myself—

Q. (Intg.) —did not what?

A. Get this man. You have asked me why I did not get these men or look them up. At the time that Judge De Haven ruled that the burden was upon us to show how this accident occurred and whether it was within the insurance policy, the Napa Gravel & Material Company, if I remember, had not yet been made a party to this action; we

(Testimony of Theodore A. Bell.)

were brought in subsequently, and I was not familiar with the decision of Judge De Haven, and I always assumed that the burden of proof was upon you, and that you, if you wanted these men to show the circumstances, would have these men here. Now, perhaps that was a little careless on my part, but that is the reason why I did not go out and get these men, I assumed you had the laboring oar and would have these witnesses here.

Q. It is true, is it not, that all these three men, the only ones who know anything about this case, were in your employ at the time? A. No.

Q. Not true?

A. The two men on the launch were not in our employ.

Q. They were not in your employ?

A. Not at all.

Q. That is technically speaking? A. Oh, no.

Q. They were working for you, were they not?

A. No, they were not; Crowley, an independent contractor, was to furnish the launch and its two men at so much per day.

Q. You are speaking as a lawyer, but as a matter of fact they were working at your business, and for the purpose of your business, were they not?

A. Yes, but we would not have the right to give them any orders as to the operation of that launch.

Q. Now, how about the third man that was on the barge? [196]

A. He was our man; his name was F. Johnson.

Mr. HENGSTLER.—That is all.

(Testimony of A. Hatt, Jr.)

Mr. DENMAN.—If your Honor please, Captain Goodall, one of the members of the firm of Bennett & Goodall, has just reached town from the South, and we would like to reserve the right to put him on later, in case we can get him here this afternoon, and with that reservation, we will close our opening case at this time.

[Testimony of A. Hatt, Jr., for Libelant (in Rebuttal).]

A. HATT, Jr., called for the libelant in rebuttal, sworn.

Mr. HENGSTLER.—Q. Mr. Hatt, what is your business?

A. I have been owner and manager of the Napa Transportation Company.

Q. Will you please state to the Court the extent of your familiarity with Napa Creek, navigation on the Napa Creek?

A. I have been there all my life. I have been connected with shipping all my life.

Q. In what connection?

A. As manager and owner and directing.

Q. Directing shipping on that river?

A. On that river; yes.

Q. Always in connection with the Napa Transportation Company or also in other connections?

A. Well my father was there before me and I used to be with him.

Q. Mr. *Hatch*, do you remember the stranding of the lighter "Number One" of the American-Ha-

(Testimony of A. Hatt, Jr.)

waiian Steamship Company in April, 1907?

A. Yes, sir.

Q. Were you familiar with that lighter at the time? A. Yes, I had seen her.

Q. You had seen the lighter? A. Yes.

Q. Did you see the lighter after it was stranded there? [197] A. Yes.

Q. Now, at what place was the lighter stranded when you saw her, what place in the river?

A. A little below Lone Tree.

Q. Will you please describe the nature of the Napa Creek in that neighborhood with reference to dangers of navigation, in the neighborhood of Lone Tree and Horseshoe Bends?

A. In what direction?

Q. Navigation down the river?

A. I do not quite understand.

Q. How is the stretch from Lone Tree Bend to what is known as—what is the name of that place, Suscol? A. Yes, Suscol.

Q. (Continuing.) What are the difficulties of navigation on that stretch on the Napa River?

A. Well, on the falling tides they are not very good.

Q. On falling tides?

A. On a falling tide they are not very good.

Q. What do you mean by that—do you mean there are difficulties on the falling tide?

A. Yes, sir.

Q. What are those difficulties or dangers?

A. Well, a vessel or a tow would naturally drift

(Testimony of A. Hatt, Jr.)

right into the bend and go ashore, with the tide going out it leaves them low and they won't get off.

Q. Does that happen frequently at those bends?

A. Yes, I think I have seen it happen quite often.

Q. Has it ever happened with your ships of the Napa Transportation Company? A. Yes.

Q. At those bends?

A. At those and other bends.

Q. How powerful are your steamers, Mr. *Hatch*?

A. I think the "St. Helena" is about 500 horse-power, and the "Zinfandel" about three or 400, and the "Napa City" about 200 or 250.

Q. Now, if you take the case of a gasoline launch of 50 horse-power, [198] having in tow the big lighter "Number One" of the American-Hawaiian Steamship Company, fully loaded, would it be more or less difficult to navigate that down the river around Horseshoe Bend than it is to navigate your steamers?

Mr. BELL.—I object to this question, if your Honor please, upon the ground that it does not appear yet that the witness has any familiarity at all with the navigation of gasoline launches.

Mr. HENGSTLER.—All right. I will ask him about it.

Q. Have you had any experience with gasoline launches on Napa Creek?

Mr. DENMAN.—In towing?

Mr. HENGSTLER.—No, generally.

Mr. BELL.—We mean in towing.

(Testimony of A. Hatt, Jr.)

Mr. HENGSTLER.—I can only ask one question at a time.

A. I have been up and down in them several times.

Q. You have had no experience in towing with gasoline launches in Napa Creek? A. No, sir.

Q. Now, Mr. Hatt, I ask you—he has not answered that last question. Will you read the question to the witness, Mr. Reporter?

(Reporter repeats the last question.)

Mr. BELL.—We submit, if your Honor please, that our objection is well taken.

The COURT.—Let the evidence be admitted subject to your objection.

Mr. HENGSTLER.—Q. Would it be more difficult or less difficult to manage around that bend this combination of launch and tow than it is to manage your steamers? A. Yes, I think it would.

Q. Would that danger be affected in any way, either increased or decreased, if this combination passes this place in the [199] night-time, on a dark night?

A. Well, I know in a dark night they cannot see where they are going, and at daylight they can see where they are going and get ready to make these bends before they get down into them.

Q. So that the danger is greater at night, is it?

A. Yes.

Q. Have you ever gone down the river in a launch? A. Yes.

Q. Around that bend?

(Testimony of A. Hatt, Jr.)

A. Yes, around that bend.

Q. Mr. Hatt, have you ever made any observations as to whether it is possible from a launch approaching that point or any other sharp point in the river, whether it is possible to see the bend before you get to it?

A. On a dark night it is not; you cannot see the bank on a dark night.

Q. Have you ever made that special observation when you were near this particular bend?

A. Yes.

Q. Lone Tree Bend? A. Yes.

Q. Have you ever yourself gone ashore with a launch at that point? A. Yes.

Q. Why? A. Because you could not see.

Q. Are you familiar with that neighborhood?

A. Yes, very.

Q. How often have you been over that stretch?

A. Thousands of times.

Q. But you nevertheless in spite of that familiarity were caught at that point and went aground?

A. Yes.

Q. Would you consider that place, Lone Tree Bend, a place of great danger for a launch and a barge in tow, fully loaded coming down the river in a dark night? A. I would, on an ebb tide.

Q. On an ebb tide you would consider it a place of great danger? A. Yes.

Q. Would you consider that it was dangerous even if an experienced [200] hand that is familiar with the river is in charge of the launch?

(Testimony of A. Hatt, Jr.)

A. On an ebb tide, yes.

Q. Why, Mr. Hatt?

A. That is, on a dark night on the ebb tide.

Q. On a dark night?

A. Yes, because they could not see where they were going, and if the barge got down too low and touched the bank they could not get her off with small power.

Q. Would you yourself, with your experience, Mr. Hatt, undertake such a job as to take a fully loaded barge loaded with gravel of the dimensions of lighter "Number One" down Napa Creek with a gasoline launch on a dark night and a falling tide?

Mr. DENMAN.—I object to that if your Honor please, upon the ground that he said he did not have any experience in towing with gasoline launches, it is calling for a conclusion of the witness on a subject on which the witness is not qualified as an expert.

Mr. HENGSTLER.—I think he has had the experience.

The COURT.—He can state his opinion as a navigator.

Mr. DENMAN.—I don't think there is any testimony as to his being a navigator. My impression is that he is not even licensed.

The COURT.—I understood that he was, on direct examination.

Mr. HENGSTLER.—Have you got a license, Captain? A. No.

Q. Why not? A. Because I never wanted one.

Q. You never needed one as manager of these boats, did you?

(Testimony of A. Hatt, Jr.)

A. As manager and owner I never needed one.

Q. Now, I will ask you to read the last question, Mr. Reporter.

(Question repeated by the Reporter.)

Mr. DENMAN.—I urge the objection.

The COURT.—It will be overruled and you can take an exception. [201] A. No, sir.

Mr. HENGSTLER.—Q. How high, in your opinion, are you above the banks of the river as you approach Lone Tree Bend in a launch, Mr. Hatt?

A. How high is the bank?

Q. No; how high are your eyes above the bank?

A. At what stage of the tide?

Q. At falling tide.

The COURT.—Q. How high are the banks at that point?

A. Well, I should judge they are about 2 feet above high water, 2 or 3 feet above high water.

Q. Then that is 4 or 5 feet? A. Yes.

Mr. HENGSTLER.—Q. Now, you saw that lighter the day afterwards, did you?

A. Yes, I did.

Q. Or sometime afterwards?

A. The day afterwards.

Q. Did you come to any conclusion as to the reason why—what condition was she in at the time?

A. Well, she had collapsed then.

Q. Did you come to any conclusion from her appearance as to the reason why she collapsed?

A. No; she had a large load on her, that is all; that is the only reason.

(Testimony of A. Hatt, Jr.)

Q. Is that the only reason that you could see for her collapsing, that she had a large load on her?

A. Yes.

Q. In the way in which she lay there would she have collapsed if she had no load on?

A. I do not think so.

Q. Do you know whether or not any of your steamers ever get on shore near those bends? I don't know if I asked you that before or not.

A. There are shoals right before you get to Lone Tree where they have been ashore.

The COURT.—Q. You mean out in the channel.

A. Out in the channel.

Q. He is asking about the banks.

A. No, not right there, not that I know of.

Mr. HENGSTLER.—Q. Do you know whether or not at other points on Napa River any of your steamers went ashore? [202] A. Oh, yes.

Q. Is that usual or unusual?

A. Well, it happens once in a while.

Q. Where does it happen most, in what part of the river? A. On the upper part of Napa River.

Q. On the upper part of Napa River?

A. Yes, sir.

Q. Now, if they go ashore have any of them ever been wrecked there or collapsed? A. No, sir.

Q. They never have? A. No, sir.

Q. Why should that not happen to them when it happened to this lighter, in your opinion?

A. Well, they never were loaded.

Q. So that the only reason that you can see for

(Testimony of A. Hatt, Jr.)

that condition is the overloading of the lighter?

A. I would not say overloaded because I don't know.

Mr. DENMAN.—I object to that.

Mr. HENGSTLER.—Q. Would you say that in your opinion she must have been overloaded?

A. I don't know whether she was overloaded; I would say because she had a load; when she would go up on the bank and the tide would fall away from her she would naturally break in two if she had a load in her, and our boats would have done the same thing if they had been in the same position.

Q. What is the breadth of the water at Lone Tree Bend? A. I should judge about 200 feet.

Q. Do you know the barge "Energy," Mr. Hatt?

A. Yes, sir.

Q. Is she a barge like this lighter "Number One"?

A. No, she is more of a barge than a lighter; the lighter is a squarer box.

Q. And the lighter is not a barge but a lighter?

A. A lighter.

Q. What is the difference between them? [203]

A. Well, I think there are better lines on the "Energy"; she is built more for towing, and a better constructed boat, the lighter is something that you put a heavy load on and move around.

Q. What are the lines of the lighter?

A. Well, there is less resistance to the water in towing.

Q. Which is easier to tow, a barge or a lighter?

(Testimony of A. Hatt, Jr.)

A. I think a barge would be very much easier to tow.

Q. Very much easier to tow on account of her lines? A. Yes.

Q. At that season of the year, in April, what, in your opinion, is the speed of the current at ebb tide in that river?

Mr. DENMAN.—What portion of the ebb are you speaking about—what portion of the ebb tide?

Mr. HENGSTLER.—At lowest ebb?

A. I should judge about 2 to 3 knots, 2 to 3 miles an hour.

The COURT.—Q. That is the most rapid run-out?

A. Yes, sir.

Q. What time does that occur in the run-out?

A. About the middle of the tide, in the middle to the latter part of it.

Mr. HENGSTLER.—Q. Are you familiar with the banks of the Sacramento River, Mr. Hatt?

A. Yes.

Q. How do they compare with those of Napa Creek?

A. Well, the banks of Napa Creek are all mud; on the Sacramento River there are more tule than mud.

Q. Which of the two rivers is safer to navigate *than* easier?

A. Well, I think the Sacramento River would be.

Q. The Sacramento River is less dangerous, is it not?

A. Well, I think the Sacramento River would be.

Q. The Sacramento River is less dangerous, is it

(Testimony of A. Hatt, Jr.)

not? A. I think so.

Mr. DENMAN.—Are you speaking of the river or the tributaries? [204] A. The river itself.

Q. The river itself? A. Yes.

Mr. HENGSTLER.—Q. The river itself?

A. Yes.

The COURT.—We will take a recess until 2 P. M.

(A recess was here taken until 2 P. M.)

AFTERNOON SESSION.

A. HATT, Jr., direct examination resumed.

Mr. HENGSTLER.—Q. Are you sufficiently familiar with Sonoma Creek to make a comparison between it and Napa Creek with reference to difficulties of navigation?

A. I have been up Sonoma Creek several times and I know about what it is.

Q. How do the banks of Sonoma Creek compare with those of Napa Creek?

A. At the lower end they are all mud and there is a very narrow channel, soft mud.

Q. That affects the dangers of navigation in what way?

A. It has not the dangers that the hard banks have.

Q. Now, Mr. Hatt, in going down Napa Creek, in sailing down in any kind of river craft with or without a tow, in sailing down in the night-time towards Lone Tree Bend, is there anything in the circumstances that would make the navigation there more difficult than it ordinarily would be?

A. There are shoals just right above Lone Tree

(Testimony of A. Hatt, Jr.)

Bend and if a man gets on those shoals it is hard work to get off.

Q. As far as the power to see ahead is concerned, Mr. Hatt, is there anything in that locality that would make the place more difficult to negotiate than it would be without that circumstance?

A. I consider it a very dark bend. [205] The shadow from the hills and the big gum trees below, make it very dark.

Q. How many of those gum trees are located there?

A. I don't know. There are a very great many; there is a big forest of them.

Q. That forest and the configuration of the hills acts in that way, that it makes the place particularly dark? A. Yes, sir.

Q. How far ahead could you see as you were going down the creek on a dark night without any moon?

A. A very dark night I don't think you could see from 25 to 50 feet ahead.

Q. Do you think you could see 25 feet ahead?

A. That is from a small launch.

Q. It would be different, would it not from the bridge of a steamer?

A. Yes, sir; I think you could see better.

Q. Now, Mr. Hatt, from what you saw on the morning of this accident when you saw this lighter on the bank, and from your previous experience in sailing in that neighborhood with a launch as you have stated, and from all the circumstances surrounding the facts on that day, have you come to any conclu-

(Testimony of A. Hatt, Jr.)

sion as to how the man in charge of that launch got on the bank?

Mr. DENMAN.—The same objection, if your Honor please. There is no showing that this gentleman has had any experience in towing either with steam or gasoline.

The COURT.—Very well. Proceed.

Mr. HENGSTLER.—Q. Have you formed any opinion as to how it happened?

A. I think the lighter was drawing a great deal of water. She took the suction on that shoal. Probably the man did not start to bring her round the point before she got too far in the bend, and she just went ashore. [206]

Q. Do you know whether or not steam tugs of greater power than 50 horse-power navigate between Suscol and Napa City? A. Yes, sir.

Q. Is it an ordinary thing that steam tugs go up and down the river? A. Yes, sir.

Q. At that place? A. Yes, sir.

Cross-examination.

Mr. DENMAN.—Q. Mr. Hatt, what is your position in this company? A. In what company?

Q. In this transportation company?

A. I was manager and owner there.

Q. What does that mean? What do you mean by manager?

A. Well, I operated the boats and directed how they were to be operated and the like.

Q. How many boats had you? A. Three.

(Testimony of A. Hatt, Jr.)

Q. You are not a mariner yourself, are you?

A. No, sir.

Q. Have you ever engaged in the business of towing yourself personally? A. No, sir.

Q. You do not pose as an expert on towage, do you?

A. I would know if it was done right.

Q. You can tell if a barge is wrecked, that she has not been properly handled? A. Yes, sir.

Q. Your idea is that this man failed to pull this around the turn, this barge, and she went on shore?

A. Yes, sir.

Q. He failed to get his power in at right angles to pull her around? A. Yes, sir.

Q. You were saying that down there at night it is dark and you cannot see any more than 25 or 50 feet on a dark night. How do you know that?

A. I have been there.

Q. Often enough to know? A. Yes, sir.

Q. How many times? A. A great many times.

Q. At night-time? A. Yes, sir. [207]

Q. On what?

A. On the boats. I have been on a launch there. I have been up and down on a launch. We used to hunt and fish.

Q. You have navigated that place on dark nights on these boats and launches? A. Yes, sir.

Q. Where are these gum trees that you were speaking of? How far are they from this place? A mile and a half, are they?

A. I should judge a half a mile.

Q. Looking down? A. Yes, sir.

(Testimony of A. Hatt, Jr.)

Q. As you come down the stream?

A. Yes, sir, about half a mile away.

Q. How high are they? A. Quite high.

Q. They grow in the marsh?

A. They start on the marsh and grow up on the ridge.

Q. Those trees never grow up to any great height when they are growing in that water?

A. I should judge 200 feet high.

Q. Those are? A. Yes, sir.

Q. So about a half a mile away these trees cast a shadow on the water? A. Yes, sir.

Q. How do they cast a shadow unless there was some light? Suppose an ordinary dark night with starlight, with the radiation of light as it comes in from the stars, how could those trees have anything to do with it?

A. The horizon is not very clear, and it banks in a very dark bank.

Q. In spite of that you have been down there repeatedly at night and seen the same thing?

A. Yes, sir.

Q. Did you hear the testimony here, to the effect that it was customary to handle these barges at night, the loading being done in the daytime, and that they were taken out at [208] night on convenient tides? Is that correct? A. Yes, sir.

Q. That is the usual method on that creek?

A. Whenever they are loaded.

Q. Regardless of whether it is day or night or light or dark. The tide is the only thing that deters them?

(Testimony of A. Hatt, Jr.)

A. Yes, sir.

Q. Is *there* not true universally of that small boat navigation on these rivers around the bay, that the barges are towed in and out with regard to the tide, and not with regard to the day or night?

A. They regard an ebb tide as dangerous.

Q. They consider the tide rather than the light. They take any tide that is proper? A. Yes, sir.

Q. Regardless of the light? A. Yes, sir.

Q. As I understand it, you say that the towing of these barges down the stream should be done sometime before half tide,—that is to say, when the tide begins to run out and is half out it gets a fair speed on?

A. I would say they ought to be towed, that is, below Suscol, before the tide begins to turn.

Q. Before the tide begins to turn at all?

A. Yes, sir.

Q. What time would you leave before high tide? What time would you consider would be the proper leaving time before high tide to do that?

Mr. HENGSTLER.—Leave what?

Mr. DENMAN.—The upper reaches of Napa Creek.

Mr. HENGSTLER.—Where is that?

Mr. DENMAN.—A mile below the Asylum wharf.

A. It would depend how long it would take to tow down. I don't know how far it is.

Q. What is the distance from there to Suscol, from Lone Tree Bend, say a mile below the Asylum wharf to Suscol? A. Between 3 and 4 miles. [209]

(Testimony of A. Hatt, Jr.)

Q. At what rate would such a barge as this "Number One" be towed by such a launch as has been described here, 50 horse-power launch?

A. I should say two hours before high water.

Q. That would be the proper time to leave?

A. That is, providing she was going right along all the time and making that speed.

Q. And doing the best she could with that power?

A. Yes, sir.

Q. That would be the proper time to leave?

A. Yes, sir.

Q. If she left at 10 o'clock and high water was somewhere around 12 or one o'clock, that was the proper time to leave, other things being favorable?

A. Yes, sir, if she was hung up before and stopped and wasted time, and the tide was falling, I should consider it dangerous to leave on half tide.

Q. I think you are right. I assume they leave say around an hour or two hours before high tide, leave the station I have described about a mile below the Asylum wharf?

A. Yes, sir.

Q. That would be about the correct time?

A. Yes, sir.

Q. Had you ever seen this barge loaded; had you ever been on the creek when she was loaded—this particular one?

A. Yes, sir.

Q. Do you know what she carries?

A. No, sir; I did not see her but the other barge I did.

Q. What is the load that she carries, do you know?

A. Really, I don't know.

(Testimony of A. Hatt, Jr.)

Q. The barges were about identical in size?

A. Yes, sir.

Q. They will carry normally about the same load?

A. Yes, sir.

**[Testimony of H. G. Bell, for Libelant (in
Rebuttal).]**

H. G. BELL called for the libelant in rebuttal,
sworn.

Mr. HENGSTLER.—Q. What is your business?

A. Steamboat pilot. [210]

Q. To what extent are you familiar with navigation on Napa Creek?

A. I ran the “Zinfandel” there for 11 years and the “St. Helena” for a year and a half until this time. I have been on her seven or eight months this time.

Q. Do you know the place in Napa Creek called Lone Tree Bend? A. Yes, sir.

Q. What sort of a place is it, as far as navigation is concerned? How does it compare with other places on the river?

A. It is a pretty good bend compared with some of them. The bend is in fine condition; a good place to get around providing you take advantage of it.

Q. What do you mean by that “providing you take advantage of it”?

A. Keeping in the bend until you get your boat in proper shape to make the bend.

Q. You take that bend easily in its present condition?

(Testimony of H. G. Bell.)

A. We never have any trouble at all. We never did have any trouble there.

Q. Were you navigating there on that creek before 1907? A. Yes, sir.

Q. Since that time the bend has been dredged, has it not, Captain?

A. It has been dredged about 4 or 5 months ago.

Q. About 4 or 5 months ago? A. Yes, sir.

Q. Has it been dredged at any other time before that?

A. Yes, sir, but I was not running there at that time. I don't exactly remember. It is about 15 years ago when the first dredger came up there that I remember of.

Q. The river at different places has been dredged a great many times, has it not? A. Yes, sir.

Q. In the last 20 years? A. Yes, sir.

Q. And that improves the navigation, does it not? [211]

A. Yes, sir, it is in a better condition now than it ever has been.

Q. How was it in April, 1907, do you remember?

A. I was not running up there in April, 1907.

Q. You were not running up there then, in April, 1907? A. No, sir.

Q. Have you ever run down the creek in the night-time in a gasoline launch?

A. I did once; I took a pleasure trip down there.

Q. Did you run the launch yourself?

A. I was steering it; I was sailing the launch.

Q. Did you have any trouble in making the bend

(Testimony of H. G. Bell.)

with the launch?

A. I only run into the bank a few times, knowing the creek as well as I did.

Q. You only run into the bank a few times?

A. Yes, sir.

Q. Why? A. I could not see the bend in time.

Q. You could not see the bend in time?

A. Yes, sir.

Q. Were you then familiar with that creek and that neighborhood, Captain, at that time when you ran into the bank a few times?

A. Yes, sir; I had been running there at that time, I guess, about 9 or 10 years.

Q. So you were perfectly familiar with it, but nevertheless ran into it because it was dark?

A. It was dark, and I could not see it in time.

Q. In your opinion is it possible at all to see a turn like the Lone Tree Bend long enough in advance on a very dark night, long enough in advance to navigate properly around it?

A. I would see it because I know the bend is there, but I don't think a stranger would see it.

Q. On the occasion when you ran into the bank you did not see it?

A. No, sir, I could not see it on the launch.

Q. When you say you could see it, you mean you could see it [212] from the bridge of your steamer? A. Yes, sir, from the pilot-house.

Q. It is easier to see the turns ahead from the bridge of the pilot-house of your steamer than it is from the launch? A. Yes, sir.

(Testimony of H. G. Bell.)

Q. Why?

A. Because it is so high, 20-foot high.

Q. You could not see it from the launch?

A. I did not see it as well as I knew the river at the time.

Q. Now, if you navigate at that place with the tide following you, with a falling tide, does that influence the difficulty or danger of navigation in any way? Does it make it harder to go around the turns or bends, or does it make no difference?

A. It never made any difference with me. I tow scows out of there, two or three at times, astern of the steamer, but I knew the creek, and could see it very well.

Q. Was that in the daytime?

A. No, sir, in the night-time.

Q. But on a clear night?

A. All kinds of weather. We went up and down in all kinds of weather, winter and summer.

Q. It was clear enough for you to see ahead, was it not?

A. You could see from the height—from the pilot-house.

Q. You did that towing with your steamer?

A. Yes, sir.

Q. Even with your experience on that creek, would you consider it safe to tow a large lighter 38 feet wide and 120 feet long, fully loaded, with a gasoline launch of 50 horse-power to tow around Lone Tree Bend and the other bends of the river in a dark night, and with an ebb tide following you?

(Testimony of H. G. Bell.)

Mr. DENMAN.—One moment before you answer that question. I object to this if your Honor please. It has not been shown that this Captain has had any experience in handling these barges of this type with gasoline launches, and that that is a specialized branch of the towage business and he is not in [213] a position to give an expert opinion.

The COURT.—The objection will be overruled *pro forma*.

Mr. HENGSTLER.—Read the question, Mr. Reporter.

(The Reporter reads the question.)

A. I would not, no.

Q. You would hate to do it, Captain.

A. Yes, sir, I would not want to do it.

Q. Do you know the young man Latimore who took that lighter around the bend at that time?

A. No, sir.

Q. Do you know him? A. No, sir.

Q. Have you ever had any conversation with him?

A. I never saw the man that I know of.

Q. Are you sure?

A. I am not sure. I might know him, but I don't know him by name.

Q. But did not the man who had the accident tell you afterwards, that he was afraid of going down?

Mr. DENMAN.—I object to this, if your Honor please.

A. He never told me anything about it. I don't know the man.

The COURT.—I do not know of any rule of law

(Testimony of H. G. Bell.)

by which that matter is competent.

Mr. HENGSTLER.—I withdraw the question.

Cross-examination.

Mr. DENMAN.—Q. Have you had any experience in towage with gasoline launches yourself personally? A. No, sir.

Q. You never handled a 50 horse-power or 100 horse-power gasoline launch in the business of towing? A. No, sir.

Q. So that you do not know from any actual experience what you can do with launches of that type?

A. I never tried to tow with a gasoline engine at all.

Q. When you are speaking of an ebb tide following you down in answer to the question that was put to you by Dr. Hengstler, you had reference to a rapidly flowing ebb tide that would [214] come behind and twist you off?

A. Any kind of ebb tide, if it is falling.

Q. The danger is that you would get caught on the bank and cannot get off?

A. Cannot get off.

Q. It is not your inability to get around but the danger of getting caught?

A. The danger of an ebb tide has a tendency to swing you in to the bend.

Q. You do not know, you are not in a position to state what that character of launch will do yourself?

A. No, sir.

Q. Then, it is a question of the skill of the man

(Testimony of H. G. Bell.)

in handling a launch in coming round those turns, providing there is water enough? A. Yes, sir.

Q. There is a big difference between the rate of the tide at the beginning of the ebb and the end?

A. It runs stronger along about the middle of the tide.

Q. And just after that middle is the strongest portion of the ebb? A. Yes, sir.

Q. The first half is not so strong?

A. Not so rapid.

Q. Take it within the first hour after high tide, there is very little movement in the water?

A. Yes, sir, there is very little movement.

Q. It begins to run about the end of the second hour at a good rate? A. Yes, sir.

Q. What do you say would be the proper time before high tide to leave a mile below the Asylum wharf, to bring down such a barge as Dr. Hengstler has described? What time should you leave before high tide?

A. I should want to leave an hour or an hour and a half before high water.

Redirect Examination.

Mr. HENGSTLER.—Q. How long would it take, on an average, [215] a launch with a loaded lighter in tow, to get from the Asylum wharf to the place where this lighter went ashore?

A. With a description of 50 horse-power that you speak of?

Q. Yes.

(Testimony of H. G. Bell.)

A. I should judge that would be according to how the barge was loaded, how deep she was.

Q. If she was fully loaded?

Mr. DENMAN.—Drawing 6 feet. That is the testimony. A. Drawing 6 feet?

Q. Yes.

A. I should judge from the Asylum wharf to Suscol—

Mr. HENGSTLER.—Q. No,—to the Lone Tree Bend. A. From the Asylum wharf?

Q. Yes, from the Asylum wharf.

A. That had not ought to take her over an hour.

Q. It ought not to take her over an hour?

A. It had not ought to take her over an hour.

Recross-examination

Mr. DENMAN.—Q. Suppose he is bucking the tide?

A. I don't know whether that gasoline launch could tow that barge against the tide.

Q. It would be much slower against the tide?

A. It would be much slower against the tide. I don't know whether she would move up against the tide or not.

Q. It might take her two hours?

A. It might take her two hours.

Q. You were speaking of this pleasure party that you were coming down on. What was that?

A. The pleasure party?

Q. Yes, at night.

A. A man by the name of Scott and Mr. Hall

(Testimony of H. G. Bell.)

and myself were going to hunt ducks.

Q. Was it a cloudy night?

A. No, sir, not extra cloudy.

Q. You were all making merry on the boat as you went around? [216] A. Only Mr. Scott.

Q. What rate were you going through the water? How fast were you going in your launch?

A. I don't think she would travel over 6 or 7 miles.

Q. 6 or 7 miles an hour?

A. I don't think she could do any better than that.

Q. Suppose you were coming down with a boat 2 knots an hour, if you were going only a third of the rate you were going then, you would have caught that bend before you got on the opposite bank?

A. I might have.

Q. Really, you were going along pretty merrily, at a pretty rapid speed?

A. I did not see it. I thought I was down at the bend, but I was not.

**[Testimony of L. H. Fox, for Libelant (in
Rebuttal).]**

L. H. FOX, called for the libelant in rebuttal, sworn.

Mr. HENGSTLER.—Q. What is your business, Mr. Fox? A. A master mariner.

Q. Please tell us what experience you have had in navigation in Napa Creek, if any.

A. I was manager of the Napa Transportation Company for a couple of years, and acting as man-

(Testimony of L. H. Fox.)

ager I had to do with the running of the boats and the setting of the time for leaving, and everything in general.

Q. During that time did you become familiar with the river, with the nature of the river, as far as it affected navigability? A. I consider I did.

Q. Do you know the place on the river called Lone Tree Bend? A. I do.

Q. What are the difficulties or dangers to be expected at that point?

A. That is a very sharp bend or point, and one has to be very careful in navigating.

Q. One has to be careful with any river craft?
[217] A. With any floating property.

Q. Now, if you attempted to pass that point in going down the creek with some lighter, especially a large lighter in tow, is carefulness to navigate there thereby increased or affected at all?

A. Most assuredly it is.

Q. In what way is it affected?

A. Because it is a very dangerous proposition to take a loaded barge around a difficult bend or a sharp bend where the ebb tide is bound to set you in the bend.

Q. Would it be easier with a steam tug than it would be with a gasoline launch to meet those dangers?

A. I am not in a position to say; I have had nothing to do with gasoline launches to speak of.

Q. You do not know the comparative reliability of gasoline launches?

(Testimony of L. H. Fox.)

A. Only as a manager, not of my personal knowledge; only as a superintendent in ordering things done.

Q. You have, however, some opinion about it which is derived from your business, have you not?

A. Yes, sir.

Mr. DENMAN.—I object to that, if your Honor please.

The COURT.—Let him answer.

Mr. HENGSTLER.—Q. Which is the more reliable in general between a gasoline launch and a steam tug? Which kind of motive power would you trust more?

Mr. DENMAN.—For what purpose?

Mr. HENGSTLER.—For the purpose of towing.

Mr. DENMAN.—Q. Where and when, and under what circumstances?

Mr. HENGSTLER.—Q. For the purpose of towing anywhere?

A. With the same horse-power comparatively?

Q. Yes. A. Steam, I should imagine.

Q. The steam tug is more reliable?

A. Yes, sir, in my estimation. [218]

Q. Now, Captain, in negotiating this place, Lone Tree Bend, is it your opinion that a steam tug would have been safer to get a large loaded lighter like the American-Hawaiian Steamship Company's lighter "Number One," safely around the turn, would it have been safer than a gasoline launch?

A. I think it depends a great deal on the skilfulness of the man at the wheel.

(Testimony of L. H. Fox.)

Q. If it had been a steam tug of 50 horse-power instead of being a gasoline launch of 50 horse-power, which would be the easier to navigate?

A. Contradicting myself a moment ago, I don't know that there would be any difference.

Q. You do not know whether there would be any difference?

A. No, sir, I cannot see where there would be any difference.

Q. Supposing it had been a towboat of larger power. That would have made a difference, would it not? A. All the difference in the world.

Q. It would have been safer, the greater the horse-power, would it not?

A. When anyone gets in trouble, which often happens in the towboat business, if you have got the power you will get out; if you have not you will not.

Q. Then, again if the tow gets ashore, stranded somewhere, it is natural, is it not, that the tug with larger power has greater facilities in saving the tow than one with a smaller power?

A. I should judge so; yes.

Q. Captain, do you know about the comparative safety of a tug and tow going down Napa River and around that bend in an ebb tide, from what it would be at high tide?

A. Are you talking about the first of the ebb tide, on high tide?

Q. At flood tide. Which is the safer, to go down and buck the [219] tide or to go down with the receding tide?

(Testimony of L. H. Fox.)

A. It is naturally safer to go down against the tide. If you run down you have got a raising tide to help you off, you would not stick.

Q. Is the danger at this place, Lone Tree Bend, affected by the fact that when you get to it with your tow it is rapidly a receding tide?

A. The same as any bend that is equally as bad as that one. They are all affected. That is where anyone can take a tow and go down in the middle of the bay, but it takes someone with, I would not say experience, but a capable man to go in difficult places.

Q. You would consider that a difficult place and a dangerous place to go in with that kind of a craft?

A. Any kind of craft. It is more difficult than it is in the straight reach.

Q. Now, Captain, would the danger be affected by the fact that it is night-time when the navigator of the launch comes down the river and arrives at that point?

A. I have been steamboating for 22 years, and I am what they call a daylight pilot every time if I can have it in preference to night.

Q. In other words, it would affect it greatly and increase the danger; the darker the night the greater the danger? A. Yes, sir, in my estimation.

Q. During the time when you were connected with the Napa Transportation Company, did you take any of her steamers up and down personally?

A. Several times; yes.

(Testimony of L. H. Fox.)

Q. Do you remember a large lighter that the Napa Transportation Company took down once, that belonged to the Sacramento Transportation Company—an unusually large lighter?

A. Yes, sir.

Q. Who took that lighter down if you remember?

A. I did myself. [220]

Q. Was Captain Pigott present at the time?

A. He was aboard of the boat.

Q. Who had charge of the boat?

A. He was master of the boat, but I was manager. I would do things myself as manager that I would not ask another man to do. It was the largest barge, I think, that was ever in Napa. I had to get down to make a connection at Vallejo and I naturally stepped aboard the boat and took the barge down.

Q. You took her down there?

A. Yes, sir, it being about two hours from low water when I left Napa, very low water.

Cross-examination.

Mr. DENMAN.—Q. You say you brought that down on the ebb tide? A. Yes, sir.

Q. And ran all these risks of these curves?

A. Yes, sir.

Q. On the ebb tide?

A. Yes, sir. I would not ask another man to do the same thing.

Q. As a matter of fact, a man of skill who handles—

A. Allow me. While it was a very large barge it

(Testimony of L. H. Fox.)

was loaded very light. It was loaded with a grading outfit consisting of 100 horses and 40-odd wagons and so forth. That did not put the barge to any depth.

Q. She was pretty long, 220 feet?

A. An immense thing.

Q. That required all the skill that you had at your command, to handle? A. Yes, sir.

Q. You have been handling the steamer "Gold" a great many years between here and Petaluma?

A. Yes, sir.

Q. That is just about as ticklish a job to maintain a schedule on as anything you have around the bay?

A. Yes, sir.

Q. You have a pretty keen knowledge of how to take those bends? A. I ought to have.

Q. Do you consider Petaluma Creek worse or better than Napa Creek?

A. I don't consider it any worse. [221]

Q. About the same?

A. Yes, sir, about the same, only the bottom of the Creek at Napa is meaner than the bottom of the creek at Petaluma.

Q. There are places on Petaluma Creek where they have gravel bottom? A. Yes, sir.

Q. The banks average about the same?

A. Oh, no; the banks at Napa are somewhat meaner.

Q. In what way?

A. They are harder, and there are more trees.

(Testimony of L. H. Fox.)

Getting under a tree you may take out the side of the boat.

Q. You are more likely to find snags in Napa Creek than Petaluma Creek? A. Yes, sir.

Q. Snags are one of the perils of the creek?

A. Yes, sir.

Q. The other perils of the creek are these sharp bends that you have to face? A. Yes, sir.

Q. So that when one man takes a barge down these creeks he has to have those perils in mind and watch for them. It is his skill against those perils?

A. Yes, sir.

Q. That is true of the Napa Creek navigation?

A. Yes, sir.

Q. You say you have never handled gasoline launches in towing, yourself personally?

A. No, sir.

Q. You would not care to testify as an expert on that branch of towage? A. No, sir.

Q. If you were leaving to do any kind of towage work, Napa, or say a mile below the Asylum wharf, to come down the creek, how long before the flood would you leave?

A. According to the power of your boat. The less power you have the longer it takes her to get down the bend.

Q. Assuming you have a 50 horse-power launch and a barge carrying 400 cubic yards, such a barge as has been described, what time would you leave before high water, to [222] bring her down?

A. I should hate to. I hardly think she would

(Testimony of L. H. Fox.)

tow against the tide at all.

Q. You have to take her on the ebb?

A. You would have to start out probably on the slack water; that is the meanest tide to get ashore on.

Q. There are barges doing it all the time, are there not? A. Yes, sir.

Q. That is a usual method of transportation on those creeks for gravel? A. For small barges.

Q. All sizes of barges as a matter of fact. You have heard the testimony as to the different sizes of barges that go up there. That is true—all sizes?

Mr. HENGSTLER.—I object to that, if your Honor please. Referring to the testimony that has been going on, no one can know what he has heard and what he did not hear.

Mr. DENMAN.—Q. You heard Captain Fisher's testimony, the launchman, that had been traveling up there for some years, who had been up there a couple of hundred times? A. No, sir.

Q. Have you ever met him on the creek?

A. I don't know him as Captain Fisher; I may possibly know him.

Q. How long ago was it that you took this large barge down there? A. About three years ago.

Q. Three years ago? A. Yes, sir.

Q. Are you sure it was not two years?

A. No, sir, over three years.

Q. Over three years ago? A. Yes, sir.

Q. Then, you took that large barge down there while the Rocky Reef was still in there?

(Testimony of L. H. Fox.)

A. No, sir, that reef to the best of my recollection was out of there. [223]

Q. Is it not a matter of fact that the reef was only taken out in March, 1910?

A. I don't know. I would not say to tell you the truth.

Q. It was over three years ago?

A. When we used to go down that creek we paid no attention to the reef; we would look out for the wreck of the barge.

Q. You mean the wreck of this barge?

A. Yes, sir; that was wrecked before I went there.

Q. The thing you were considering when you came with your long barge was getting by the reef with the barge in front; the wrecked barge narrowed the channel there?

A. Yes, sir, it narrowed the channel. I would not state now as to when the Government blew that up, whether it was before I took that barge down, or after.

Q. At any rate you are certain you took the big barge down three years ago? A. Yes, sir.

Q. The big barge? A. Yes, sir.

Q. Now, as a matter of fact you ran on the Petaluma Creek day and night, didn't you?

A. Yes, sir.

Q. And this preference that you have expressed, is only a common sense preference in having daylight over darkness? A. Yes, sir.

Q. One of the chief things you prefer daylight for, is to avoid the snags? A. No, sir.

(Testimony of L. H. Fox.)

Q. Can you see a snag as well in the daytime as at night? A. No, sir.

Q. What kind of snags do you meet on these creeks?

A. Hulks of old trees that have been sometime on the banks or some time further up the river, where the bank has washed away; the hulk of the tree has gone to the bottom of the creek. [224]

Q. You are liable to meet those more likely in the spring than at other seasons of the year?

A. After the freshets you don't know where you will find them. You will find them pretty quick.

Q. But that is a menace that you have to look out for all the year round. You have to be on the watch for that all the time?

A. No, sir; there is not a great deal of changes in them.

Q. Had you ever had to avoid a snag in the creek?

A. Yes, sir.

Q. Many a time?

A. Yes, sir; a snag don't have to be in my estimation at the bottom of a creek. An old hulk of a tree sticking out alongside of a bank that will probe you in the side is a snag.

Q. Or a floating pile or stump? A. Yes, sir.

Q. Or a timber that has fallen off into the bay?

A. Yes, sir.

Q. All those things endanger your stern-wheel or propeller? A. Yes, sir.

Q. That is true, is it not? A. Yes, sir.

Q. Let me ask you this: I know you are a steam-

(Testimony of L. H. Fox.)

boat-man, and I know there is a certain rivalry between the gasoline fellows and the steam fellows. You have heard of that on rivers, have you?

A. Not to any great extent. I don't compare one with the other,—not that I am a steamboat-man, but I don't compare one with the other. Why should I? You can hire those fellows for \$100 a month, and the steamboat-man—the poorest pilot on the front—gets \$125, and the captain \$150. You cannot hire for \$100 what the other fellow has to pay \$150 for.

Q. So that, Captain, there is a class distinction between the two?

A. Certainly, and I think there ought to be.

Q. Is there any advantage in having a small light draught boat, [225] the power being equal, in snubbing these tows around these corners?

A. At high water or an hour after high water?

Q. I am assuming for the general purposes of navigation on these creeks with sharp bends. I am asking you this as an expert? A. Surely.

Q. The smaller the boat, the power being equal, and the lesser the draught, the more advantage she has for that kind of work?

A. No, as an expert I would not come around a certain sharp point unless I had power at high tide. At high water I would have water enough to float this heavier draught boat or more powerful boat.

Q. In the ordinary course of business in handling these barges they go right along except they cannot buck the tide, and they avoid bucking the tide after a certain point of the ebb tide?

(Testimony of L. H. Fox.)

Mr. HENGSTLER.—Are you testifying?

Mr. DENMAN.—Q. That is a fact?

A. No, sir. If I was coming down towing that barge down and had a boat of that power I would have stopped and drifted around. I would have lost my headway and drifted on around that bend. I would not have continued my way.

Q. Do you think you would have had any difficulty in doing that?

A. I don't consider I would. I don't want to flatter myself that I could do any better than the other fellow, but any man who has had any towboat experience on the upper rivers, will know how to go at those things, although a man who is raised on a gasoline boat probably thinks he knows how to go at it too.

Q. Naturally, if he has been raised along with that small boat he would have a greater skill.

A. The question is whether a man has ever towed as large a tow as that in a limited territory. Towing a barge in the bay [226] —the idea in putting that bridle on the barge or tow is, when she sheers this way (illustrating) the bridle will pull her this way, and when she sheers that way (illustrating) the bridle will pull her back. They all take a run and they have got to go to a certain distance before they recover themselves.

Q. No man would be considered a first-class launchman unless he knew how to handle those situations, would he?

A. There are lots of people of all kinds of boats,

(Testimony of L. H. Fox.)

steamboats and stern-wheelers as well who have got a license, and it is no criterion to me because he has got a license, that he can run a boat.

Q. A first-class man in his business is presumed to be able to handle this snubbing process that you describe?

Mr. HENGSTLER.—I object to that. A first-class man is a definition of words.

Mr. DENMAN.—Q. There are plenty of men on the bay who have that skill? A. Yes, sir.

Q. In coming down you say, in your opinion, it would be a question of skill in going around that corner? A. Yes, sir.

Q. Now, supposing that the barge takes a sheer to starboard, to the right-hand side and you move over and apply your power to bring her over to port. It is a question of skill and judgment how much power you put on her and how you shall pull in that direction for fear you give her too much start over to the other side. That is where the judgment of the towman comes in?

A. He has got to consider the horse-power he is towing with, and the power of his boat.

Q. The risk is he will pull over too much when he begins to try to stop, sheer to one side?

A. Are you talking about straight towing or going round the bend? [227]

Q. She is going down the stream passing that rocky reach that sticks out there and just got by there; and in going by the boat has been pulled over a little bit to starboard, so she has a little starboard sheer.

(Testimony of L. H. Fox.)

He wants to take out that starboard sheer to prevent her from running on the starboard bank. At the same time he knows he has got to take his turn. It is a question of judgment how much he will pull her over to port and keep her off the bank and then again when he shall apply the power to bring her to starboard and around the bend?

A. He judges himself by looking at his tow and seeing if she is straight.

Q. That is where the question of judgment comes in, whether he has got enough power to bring her from starboard to port? A. Yes, sir.

Q. That is where the skill of the man is required, and that is where he is liable to make his error in navigation? A. That is one of them.

Q. You saw this barge lying there?

A. I saw what was left of her.

Q. You don't know anything about the facts of her going on there? A. No, sir.

Q. So you have no opinion as to how she came in that position based on any knowledge of what happened there? A. No, sir.

Q. You were saying that is one of the dangers of navigation. You meant by that that the others were the likelihood of snags and that sort of thing?

A. Yes, sir.

Redirect Examination.

Mr. HENGSTLER.—Q. Captain Fox, if a large lighter like this lighter "Number One" of the dimensions I have described, and fully loaded, takes a sheer just before getting around the point at Lone Tree

(Testimony of L. H. Fox.)

Bend, she is likely to pull a launch of 50 horse-power with her, is she not? [228]

A. The launch would be some time in straightening, in stopping the headway of the barge.

Q. If she takes a sheer to starboard she would pull the launch in an opposite direction, would she not?

A. I would not say she would pull her back.

Q. But what is the probability?

A. In my judgment in a 50 horse-power launch she has not got a great deal of control on working in a narrow space with a barge of that weight.

The COURT.—Q. How large a vessel is a vessel with 50 horse-power? A. 50 horse-power?

Q. Yes.

A. Well, you can put 50 horse-power engines in most any size hull.

Q. Are these gasoline launches ordinarily of the size of the horse-power? A. Yes, sir.

Q. Do you know this one that was used up there?

A. No, sir, I am not familiar with it, but 50 horse-power launches are 30 or 35 or 40 feet long.

Q. How much beam? A. 12, I guess.

Q. How much water do they draw?

A. 3 or 4 feet; I have a 50 horse-power launch that does some work for me.

Q. About that capacity?

A. 50 horse-power exactly.

[**Testimony of F. H. Cruthers, for Libelant (in Rebuttal).**]

F. H. CRUTHERS, called for the libelant in rebuttal, sworn.

Mr. HENGSTLER.—Q. Captain Cruthers, what is your business? A. Pilot.

Q. Are you a river pilot? A. Yes.

Q. Are you familiar with the navigation of Napa Creek? A. I have run there sometime. [229]

Q. To what extent are you familiar with it, how long? A. I ran there 45 years ago.

Q. You ran there 45 years ago? A. Yes.

Q. Have you run on that creek since that time, Captain?

A. Yes, made a couple of trips since then.

Q. How lately?

A. Well, it has been about four years, I think since I was up there that time.

Q. What kind of a creek is it as to straightness or bends?

A. Well, there are 3 or 4 crooked bends in it, 3 or 4 or 5; I don't know whether the dredgers have cut them off or not.

Q. Have you got any idea about the danger of navigating those bends, Captain?

A. Well, I will explain to you, that when we ran there we ran regularly and made a trip and connected with the late steamer "Antelope," there was no car service then, no trains running, and we used to leave Vallejo Wharf, where the "Antelope" took the passengers and go to Napa and return, and get

(Testimony of F. H. Cruthers.)

there at 8 o'clock in the morning.

Q. What kind of a boat were you running?

A. A stern-wheel boat.

Q. Now, have you any opinion as to the danger of turning one of those bends with a gasoline launch having in tow a heavy lighter fully loaded and coming down the river—in other words, have you any opinion, Captain?

A. Yes, I have got an opinion upon it.

Mr. DENMAN.—Before the Captain gives his opinion I want to object that he has had no experience in towing with gasoline launches.

A. I have always had that opinion; I have got it fixed in my mind.

Mr. HENGSTLER.—I mean an opinion as to the navigation, what is your opinion?

A. My opinion is that on an ebb tide in [230] Napa Creek, a man who has a boat with little power, that he ought to drop back of the barge and bring the barge around the bend; this ain't a barge, this is a lighter that is loaded—

Q. (Intg.) What is the difference?

A. The difference between a barge and a lighter is that a barge has got a house on it and has got rudders on it.

Q. And this is a perfectly helpless box that has got to be hauled, isn't it?

A. Yes, sir, that is just what it is, just a lighter.

Q. That particular lighter that was stranded, you are familiar with that?

A. I have seen them; I know about her dimensions.

(Testimony of F. H. Cruthers.)

Q. Now, Captain, do you think that the gasoline launch of 50 horse-power having this lighter, this large lighter fully loaded in tow, is safe in turning one of those bends on Napa Creek like the Lone Tree Bend? A. Safe?

Q. Yes. A. I do not, not on the ebb tide.

Q. Not on the ebb tide. Why not, Captain?

A. Because the barge would go into the bend, I don't think she could swing her out—the lighter would go into the bend, I don't think he would have power enough to swing her out; I think he ought to drop behind, drop the barge down, and let the current take her, and if he saw the barge going over he could back up a little bit.

Q. Would that be a perfectly safe method for a gasoline launch?

A. That looks to me like it; that is the way I would do it.

Q. Now, Captain, would it be safe in your opinion—it would not be safe to do it the other way, by having her in tow—would it be safe in your opinion in the daylight? A. When?

Q. At daylight?

A. I don't think it would be safe to have [231] her in tow with a line on her, either daylight or dark, because if you pile that lighter up you could not pull her off with that power.

Q. Of course, if it is done in a very dark night it is still unsafer, is it not?

A. Well, it depends upon whether the man is accustomed to it; if he knows which way the bend makes,

(Testimony of F. H. Cruthers.)

he can tell pretty well.

Q. He would have to know that he is right in the bend or near the bend?

A. He would have to know about which way the bend makes; some people do and some don't.

Cross-examination.

Mr. DENMAN.—Q. Have you ever handled a 50 horse-power gasoline launch for towing?

A. No, never want to.

Q. Never want to? A. No.

Q. Then, you don't want to learn of it?

A. No.

Q. They are no good?

A. I have got my idea about this.

Q. I see. You have been a pilot, haven't you, for a great many years? A. Four or five years.

Q. Never been in the towing business, have you?

A. What is that?

Q. Have you ever been in the towage business?

A. That has really been my business.

Q. Towage and pilotage? A. Yes.

Q. Have you ever towed to Napa Creek?

A. No, never have.

Q. Now, you were speaking of the place where this launch should have been put; you think it should have been put behind instead of in front?

A. I think if the boat had dropped behind—that is what I said, and dropped the barge around with the ebb tide it would have been perfectly safe; that is what I think.

Q. You think the fellow made a mistake in naviga-

(Testimony of F. H. Cruthers.)

tion by putting [232] it in front instead of behind? A. How is that?

Q. You think the launchman made a mistake in navigation in putting his launch in front instead of behind?

A. I think he should have dropped behind at the ebb tide, and furthermore I don't think he could have pulled the barge around that bend with the power he had—I mean this lighter, it is not a barge.

Q. I am presuming now that it is a lighter, a lighter carrying say 350 cubic yards of rock?

A. Yes. I heard he had 600 tons on.

Q. Presuming he had 350 cubic yards?

A. It does not make much difference; if he had 200 I don't think that boat could handle her at that tide.

Q. Now, suppose you were to learn that there was a constant business of carrying, towing lighters out of there with 300 to 350 and 375 cubic yards of gravel on them by these launches in the night-time throughout the year, what would you say as to that?

A. I heard they had them running there all the time, night and day.

Q. You think that is dangerous business, do you?

A. I do. It needs an expert pilot there, expert pilot.

Q. They have gasoline men, they are experts, are they not? A. They are very expert.

Q. What is that?

A. They have their experts too.

Q. They have their experts? A. Yes.

Q. But if they carry on this business year in and

(Testimony of Duncan Buchanan.)

year out and it goes on as an active commercial enterprise, nevertheless you think that the whole system as carried on is dangerous; is that correct?

Mr. HENGSTLER.—He can't express an opinion on that.

The COURT.—He has been expressing his opinion very freely without having had any experience with gasoline launches, and I think he expressed an opinion on that. [233]

Mr. HENGSTLER.—He is asking about the whole system. I don't know what the whole system is.

Mr. DENMAN.—I am trying to find out his opinion.

The WITNESS.—Actually, I am prejudiced against them.

Mr. DENMAN.—Well, I guess that is all.

**[Testimony of Duncan Buchanan, for Libelant,
(in Rebuttal).]**

DUNCAN BUCHANAN, called for the libelant in rebuttal, sworn.

Mr. HENGSTLER.—Q. Mr. Buchanan, what is your business?

A. Marine surveyor and master mariner.

Q. Are you familiar with Napa Creek? A. No.

Q. What connection have you with the case of lighter "Number One" of the American-Hawaiian Steamship Company that stranded on April 11th, 1907?

A. On the 15th day of April, 1907, I was instructed by Messrs. Meyer, Wilson & Company to proceed to

(Testimony of Duncan Buchanan.)

Napa Creek, take all data concerning the barge that was stranded—also to find out the amount of salvage, if there was any, that was on the barge, the condition of loading, if possible, and the height of the mugging around the barge, the condition of the timbers.

Q. What do you mean by the mugging?

A. The mugging is what the bargemen generally call—it is like a bulwarks; it is put up around the barge; we generally call it the mugging; the bargemen call it the mugging, to keep the sand and gravel from going overboard; it holds it in the circumscribed space.

Q. Did you proceed to that spot?

A. I was instructed on the 15th and on the 16th I proceeded to the barge.

Q. What did you do when you got to the place where the barge was?

A. I tried to get the measurements, which was impossible [234] as the barge was all broken up; the muckle-keel was parted from the floor; the side timbers were all fractured, the flooring was fractured in the center right down; the floor of the deck on one side of the barge was on top.

Q. Could you tell from the investigation you made, whether the barge was staunch and strong in its construction and material before she got there?

A. By reference to the structure, I could not tell whether she was a strongly constructed barge or not. She was so broken up; but the material that I seen was in good condition, such as the barge's fastenings

(Testimony of Duncan Buchanan.)

and the woodwork, the wood was fresh; I could find no rotten wood.

Q. Now, from your investigation, did you form an opinion as to the reason why that barge collapsed on the stranding?

A. I came to the conclusion, being in Napa Creek—

Mr. DENMAN.—One moment. I object to the question upon the ground that the foundation has not been laid as to the knowledge he had for a certain opinion and no foundation has been laid as to the probable facts on which he could base a conclusion of that kind, and third—

Mr. HENGSTLER.—He fully examined it, he has stated that.

The COURT.—He is asking his opinion from his own examination of the barge.

Mr. DENMAN.—This is 5 or 6 days after.

The COURT.—The condition he found it in at that time.

Mr. DENMAN.—We note an exception.

The COURT.—You may proceed.

Mr. HENGSTLER.—Q. From the condition that you found that barge in, did you form an opinion with reference to the reason why she collapsed?

A. I did, I think the barge—

Q. (Intg.) Did you make a special examination for the purpose [235] of determining that?

A. I did.

Q. Well, what conclusion did you come to?

A. The conclusion I arrived at was that there was an unreasonable load upon the barge; otherwise she

(Testimony of Duncan Buchanan.)

could not have collapsed in smooth water in Napa Creek.

Cross-examination.

Mr. DENMAN.—Q. Are you a navigator?

A. I am.

Q. You are a navigator? A. Yes.

Q. How long have you been?

A. My first certificate was in 1873.

Q. Did you ever handle any towage work?

A. No.

Q. Don't know anything about it?

A. Nothing about towing.

Q. Do you know what angle that barge lay at when she first struck?

A. I know that she was lying alongside the bend on that lower point of Horseshoe Bend, near Lone Tree Farm, when I examined her.

Q. On the lower point?

A. On the lower part of that bend, on the bend just as you go down.

Q. With reference to this chart. Here is Horseshoe Bend running around here, and I understand it was on the lower point here that you found her (indicating)?

A. Where is Lone Tree Farm; she was right on the spud, on the spit that runs out on the bend.

Mr. HENGSTLER.—Q. That is at A, is it?

A. About that there (pointing). This is a spit right here that runs out there, as you go around the bend.

The COURT.—Q. On this side of the river (point-

(Testimony of Duncan Buchanan.)

ing)? A. On this side of the river.

Mr. DENMAN.—Q. Now, do you know whether she was in the same position she was in when she struck?

A. I do not. I do not know the date of her striking, I only know the date I arrived there and examined her. [236]

Q. At the time she was all practically broken up?

A. Practically broken up. On one side she was completely demolished, and on the offshore side she was factured.

Q. Now, suppose she were drawing 6 feet of water—what does that barge draw, by the way, fully laden?

A. Now, I don't know the dimensions of the barge. I don't even know her dimensions. It was impossible to take any measurements; she was broken up.

Q. How did you come to say she was overloaded?

A. Simply by the fact that she would have never broken up in smooth water without there was an extra heavy load on her.

Q. Well, now, suppose she is over at an angle, at a big angle like that?

A. She was not over at a big angle.

Q. Suppose now that she was at first? A. Yes.

Q. Suppose she was over at a big angle like that, would not such a lying strain on her break her up?

A. The shifting of the center of gravity from the axial lines would cause a big strain.

Q. And would not that be liable to break her up?

A. It would be liable to rupture her; yes.

Q. Now, if it were testified here that she was at a

(Testimony of Duncan Buchanan.)

heavy angle or a considerable angle towards the center of the stream just after she struck, would not that be strictly because of her having broken to pieces?

A. Well, no; I do not think it should go to pieces so quick.

Q. You do not?

A. No, not if the structure was correctly put together, she would not have gone so quickly to pieces.

Q. But then, if she was incorrectly put together she would go?

A. Decidedly, if she was weak for a barge, she would go to pieces.

Q. Now, if she was overloaded, of course that would be indicated by her draught, would it not?

A. Yes. [237]

Q. You can't overload a vessel without showing that by her going down into the water? A. Yes.

Q. Suppose her normal draught was, when fully loaded, about 7 feet, and suppose she was drawing at the time she came down in the creek up there 6 feet of water, would you say she was overloaded?

A. What was her normal draught—what is the depth of the vessel?

Q. I am saying now when she had a normal draught—

A. (Intg.) I want to know the depth of the vessel, before I can give you an opinion.

Q. Listen to my question now: Suppose that her normal draught when fully loaded is 7 feet six?

A. Yes.

Q. And that her draught in the creek on that night

(Testimony of Duncan Buchanan.)

was about 6 feet? A. Yes.

Q. Would you say that she was overloaded?

A. Well, she would have had at 6 feet less displacement.

Q. And that would indicate she had not her full load? A. Yes.

Q. If that were the fact you would not say that the cause of her smashing was an overload, would you?

A. I would take that as a fact, yes.

Q. I say if that were the fact?

A. If it were the fact, yes.

Q. You would not say that it was the overloading that caused the smashing of the barge, would you?

A. I should say that is the normal draught of it, 7 feet 6.

Q. Would you say her overloading was not the cause of the smash-up?

A. I should say that it was not. There were some things weak in the structure.

Q. Weak in the structure, or something due to the strain of the angle in which she was lying? [238]

A. Well, I think that it was something defective either in the structure or too much weight on the barge that was the cause of the breakup.

Q. You have testified, have you not, that if she was at the severest angle, there would be a sheering strain that would break her up anyway?

A. A tendency to do so, because when you shift the axial line of gravity and the buoyancy of the barge is a negative quantity, there is a sheering strain.

Q. These barges are none of them constructed for

(Testimony of Duncan Buchanan.)

the purpose of taking those heavy sheering strains, are they—that is not the usual thing for a barge, is it?

A. Well, any barge going on shore and through the water should not have collapsed.

Q. Should not have collapsed?

A. Should not have collapsed.

Q. Then, if that be the case, if this collapse was due to a defect in the barge, it was on account of some defect in this barge which these people had furnished us, I suppose?

A. It was either through that or too heavy a load, as I said before.

Q. Or to the heavy angle at which she was lying on the bank?

A. That would cause a sheering strain.

Q. The more the angle the more the sheering strain?

A. Decidedly, but she was not at that angle to give a great sheering strain.

Q. When you saw her? A. When I saw her.

Q. She might have been higher on the bank once she ran on?

A. No, she never shifted once she got there, she never moved.

Q. Suppose she had not gotten to her permanent resting place?

A. She got there all right, she would never shift.

Q. How do you know she never would? You say she was broken up, the timbers were smashed?

A. Yes. [239]

(Testimony of Duncan Buchanan.)

Q. How do you know she did not shift?

A. Well, I know she did not shift because the weight of the sand is on top of the floors.

Q. Was the sand on her when you saw her?

A. On top of the floors, down on top of the floors; a portion of it had washed down.

Q. On top of the floors?

A. Yes. On the floors of the barge; the deck was on top of the floor, and some of the sand was there.

Q. You don't know whether before that condition arose she had shifted or not?

A. No, she could not shift.

Q. Why couldn't she shift?

A. She could not ever shift.

Q. Why?

A. The weight of the material kept her right in the position where she struck.

Q. Suppose the tide lifted her?

A. The tide could not lift her; it could not raise her a bit; she had no more buoyancy.

Q. She was wood, was she not?

A. Yes, but there was nothing there for to lift; the tide could run out and in; she did not have any buoyancy then.

Q. I think you said she was smashed right down?

A. Smashed right down.

Q. How did the tide run in and out of her; how could the tide run in and out?

A. It flowed in and out of the structure, as it lay there.

Q. Your theory then is either that the barge was

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(Testimony of Duncan Buchanan.)

defective or that she was overloaded?

A. That is my opinion.

Q. Do you know what day the accident occurred?

A. I don't. I only know the date I examined her.

Q. As a matter of fact, don't you know it was 5 or 6 days after the accident that you were there?
[240]

A. It was the 16th day of April that I examined her.

Q. That would be five days after; by whom are you employed?

A. Meyer, Wilson & Company. I am an associate of Captain Metcalfe of Lloyds and I was sent up there.

Q. By Meyer, Wilson & Company?

A. Meyer, Wilson & Company.

Q. For the insurance people?

A. I don't know who it was for.

Q. Who paid you for going there?

A. Meyer, Wilson & Company, the party that employed me.

Q. You made your report to Meyer, Wilson & Company?

A. My report went to Captain Metcalfe, my superior.

Q. Captain Metcalfe is Lloyd's agent, is he?

A. No, he is not Lloyd's agent; he is Surveyor to Lloyd's Register.

Q. He is employed by a great many insurance companies here, isn't he, for surveying? A. Yes.

(Testimony of Duncan Buchanan.)

Redirect Examination.

Mr. HENGSTLER.—Q. All the surveyors are employed by insurance companies?

A. By insurance companies.

Q. And sometimes by steamship companies, are they not? A. Yes.

Q. Shipping companies? A. Yes.

**[Testimony of George H. Pinkham, for Libelant
(in Rebuttal).]**

GEORGE H. PINKHAM, called for the libelant in rebuttal, sworn.

Mr. HENGSTLER.—If your Honor please, among other things, I expect to prove by this witness that he had a conversation with the man who was in charge of the towing operations at the time when the barge had her accident, and that during that conversation the man objected to making this trip on account of its dangerous character, as he expressed it in the deposition, that he “kicked”; your Honor has indicated that it was not competent.

The COURT.—It does not occur to me that it is competent [241] testimony, but if you want to put it into the record for the future you can do so, subject to the objection.

Mr. HENGSTLER.—Your Honor expressed some doubt as to its being proper testimony. Testimony was taken that he did the work for Mr. Crowley and Mr. Crowley as an independent contractor. There seems to me—

The COURT.—(Intg.) You can put it in the record for whatever it is worth.

(Testimony of George H. Pinkham.)

Mr. DENMAN.—Subject to our objection.

The COURT.—Yes.

Mr. DENMAN.—That whole line of testimony is subject to our objection.

The COURT.—Yes.

Mr. DENMAN.—That it is hearsay testimony.

Mr. HENGSTLER.—I offer it as an admission by the respondent by a person who at the time was employed by the respondent and who made this remark in the regular course of his employment.

Q. Captain Pinkham, do you remember a man by the name of Latimore? A. Yes.

Q. You know that he was the man who towed the American-Hawaiian lighter “Number One” at the time she went ashore? A. Yes.

Q. Did you either before or after the accident have any conversation with Latimore with reference to his towing that barge down the river, down Napa River?

A. At the time the barge went ashore.

Q. What did he say to you at the time?

A. He told me that it was too unwieldy for him to handle with that towboat.

Mr. DENMAN.—What was the time?

The COURT.—The time when the barge went ashore.

Mr. DENMAN.—I do not understand it, whether he was aboard [242] the launch at the time, or not.

Mr. HENGSTLER.—At the time that the launch went ashore, he said.

The COURT.—Fix the date of the conversation so

(Testimony of George H. Pinkham.)

as to get the record clear.

Q. Do you remember Captain whether this conversation took place before the accident or after the accident? A. After the accident.

Q. Do you remember how long after the accident?

A. One day.

Q. What did he say to you at that time?

Mr. DENMAN.—Now, if your Honor please, we object to that upon the ground that it is hearsay evidence, immaterial, irrelevant and incompetent, and no agency has been shown to make an admission of that character.

The COURT.—As I said before, in my judgment it is not competent testimony, but counsel may have it put into the record, for the future, if he desires to do so, subject to your objection.

Mr. HENGSTLER.—I have offered it as an admission.

The COURT.—The general rule is that an agent cannot make an admission that would bind the principal after the accident.

Mr. RAYMOND.—This man was hired by the day, and the agency had expired.

Mr. DENMAN.—And on the further ground that at no period of his employment was he an agent for the making of admissions of this character.

Mr. HENGSTLER.—Q. What did he say, Captain?

A. He told me that that barge was too unwieldy to handle; and they told him, you have gone down once with that barge, you have got down once, and he said

(Testimony of George H. Pinkham.)

you must not think because I [243] have did it once I can do it every time successfully.

Q. Captain, what is your business?

A. Master mariner.

Q. Are you familiar with the Napa Creek?

A. Yes.

Mr. HENGSTLER.—I am willing now to save the Court's time, to excuse the witness. I am going to ask him the same questions with regard to the dangerous character of the bend; if you are willing to stipulate that he will testify the same as the other Captains who have testified I will let him go.

Mr. DENMAN.—I think we would rather examine *her*.

Mr. HENGSTLER.—Q. Captain, to what extent are you familiar with navigation at Napa Creek?

A. Well, 21 years' experience.

Q. What kind of boats did you navigate?

A. Stern-wheeler boats.

Q. Stern-wheeler steamboats?

A. Yes, steamboats.

Q. During that time have you become familiar with the nature of the creeks and other branches?

A. Yes.

Q. With reference to dangers in the navigation and difficulties in the navigation, are the different parts of Napa Creek different?

A. Yes, they are all different.

Q. They are all different. Which do you consider the difficult and dangerous part of Napa Creek to navigate? A. The most dangerous bend?

(Testimony of George H. Pinkham.)

Q. Yes. A. Carr Bend.

Q. What other parts of the river would you consider dangerous to navigate? A. Lone Tree Bend.

Q. Are there any other ones?

A. No, they are all about alike.

Q. Captain *Pigott*, are you familiar with the point of Napa Creek called Lone Tree Bend? A. Yes.

Q. You said that was one of the dangerous places in the creek? A. Yes, one of them. [244]

Q. In navigating past that place you use special care, do you not, with your steamers?

A. Yes; it is only the bend in the river where it casts a shadow.

Q. Are you familiar with gasoline launches, Captain? A. Only pleasure boats, not towing.

Q. Would you consider it safe for a gasoline launch of 50 horse-power, having in tow a large lighter—you are familiar with lighter “Number One” of the American-Hawaiian Steamship Company?

A. Yes.

Q. A large lighter of the size of that lighter, and fully loaded, to tow that large lighter around Horse-shoe Bend at a dark night, with the falling tide?

A. Not with a falling tide, not with an ebb tide.

Q. Why not, Captain?

A. Well, because if he started to tow that with that launch, 600 tons, he would never keep her off the bank with that launch.

Q. Is that the only reason why it would not be safe, or is there any other reason?

A. No other reason that I can see.

(Testimony of George H. Pinkham.)

Q. Is there any danger of her going on the bank at that place? A. In Lone Tree Bend?

Q. Yes.

A. Yes, it is a very deceiving bend on account of the shadows because you are liable to go right by before you can turn.

Cross-examination.

Mr. DENMAN.—Q. You say you handled stern-wheel boats? A. Yes.

Q. Have you ever handled any propellers at all?

A. No.

Q. Do you know anything about screw vessels?

A. Only pleasure launches.

Q. Those are about 4 or 5 horse-power?

A. 6 or 8.

Q. That is for speed, not for power? [245]

A. Well, for pleasure mostly.

Q. Now you were speaking about meeting this fellow Latimore; where did you meet him?

A. I tied up alongside the barge, the American-Hawaiian barge, when she sunk with the "Napa City," and he came aboard the "Napa City."

Q. He came aboard and had a talk with you?

A. Aboard the steamer "Napa City."

Q. Did you attempt to pull the barge off?

A. No, we did not have power enough; she was too far out of the water, on the east bank.

Q. Suppose you had waited for the next tide?

A. I stayed alongside of her until the next tide; I ran alongside of her at 3 o'clock in the afternoon and I left there at 7 o'clock at night.

(Testimony of George H. Pinkham.)

Q. I see; that was the next day?

A. The day after the accident, the night after the accident.

Q. Did you have a high tide while you were there?

A. No, it was low tide; the tide was ebb tide.

Q. Why didn't you attempt to take her off?

A. I had no orders, the "Walter Hackett" laid there, a launch was there.

Q. In other words, there were boats there to pull her off if she could have been pulled off?

A. The company's boat, the "Walter Hackett," was there.

Q. Now, you didn't hear this kick this man made yourself, did you? A. He told it to me.

Q. You did not hear this kick yourself made by him to anybody, did you—you did not yourself?

A. He said—he made it to me.

Q. You did not hear any kick this man made to anyone else; he [246] simply told you he had made a kick?

A. Yes, that is what he told me after the accident.

Q. What did you say about it, about his skill in handling that barge at that point?

A. Well, I did not know the circumstances of the tide that he went down in. I only saw him on the bank there when I came by.

Q. You think he should have handled it on some tides and not on others; is that it? A. Yes.

Q. What mood was he in when he told you this, how did he come to tell you this?

A. Well, he felt awfully bad to see the barge up

(Testimony of George H. Pinkham.)

on the bank and the launch on the other bank high and dry.

Q. He was trying to explain it was not his fault, wasn't he?

A. The launch was on one side and the barge was on the other side.

Q. She was pretty high up on the bank at that time? A. The barge?

Q. Yes.

A. Yes, she was, just a little below high-water mark.

Q. Which side of her was out of the water most?

A. Well, I could not exactly say that; one corner was on the bank and the side towards the south was farthest toward the water.

The COURT.—Q. Was she lying parallel with the stream?

A. She was lying about northeast and southwest.

Mr. DENMAN.—Q. One edge was higher than the rest of it? A. Yes.

Q. Did you notice that particularly; are you sure of that?

A. Well, I walked right on top of the gravel; I walked right over her.

Q. Now, you were speaking about the danger of going down these streams. This opinion of yours is not based on anything but stern-wheel navigation, is it? A. Stern-wheel navigation, yes. [247]

Q. That is the only class of navigation you have had experience in? A. Yes, that is all.

Q. By the way, you read the testimony about

(Testimony of George H. Pinkham.)

snags in this creek, didn't you? A. Yes.

Q. You have to watch for those all the time, don't you?

A. They stay in the same place, you don't have to bother with them.

Q. A floating pile comes along occasionally?

A. No, very seldom.

Q. But they do occasionally?

A. Usually they lodge in the banks—we know where they are and keep out of the way.

Q. I know, but I suppose they have to get there, don't they? You say they lodge on the bank; they have to float in to get there on the bank, don't they?

A. Well, they are old trees that are there already and the bank washes away and leaves them sticking there.

Q. You are liable, if you are not careful, to run on these snags and injure your propeller or stern-wheel, aren't you?

A. Yes, but we know where they are and we never touch them.

Q. But if you are negligent or careless you are liable to? A. Yes.

Q. Encounter that peril? A. Yes.

Q. That is one of the constant dangers in the creek that you have to watch out for, is it not?

A. Yes.

Q. Now, do you know anything about this man Latimore, personally?

A. The first day I ever met him was the day after the barge sank.

(Testimony of George H. Pinkham.)

Q. You stayed there for several hours?

A. I stayed there at low tide and waited for the flood tide to run in, about two hours before I started to Napa.

Q. Why did you stay there; on account of the condition of the tide?

A. Because I could not get over the rocks. [248]

Q. You could not get over the rocks?

A. No, sir.

Q. That is the Rocky Reach that you refer to?

A. Yes.

Q. How much water do you draw?

A. We were drawing about 4 feet.

Q. About 4 feet at that time? A. Yes.

Q. Do you know what the barge drew there?

A. No, I don't know what she drew; I could not say that.

Q. About 6 feet?

A. Yes, she drew that and probably more.

Q. Could you tell?

A. No, I could not tell that, what she drew, because I don't know how deep she was.

Q. Had the load began to wash off at that time?

A. Not a bit, no.

Q. Now, what do you know about the handling of these barges on the bay by these launches; have you ever watched that?

A. I have watched them going up and down.

Q. They handle pretty large lighters and barges, don't they? A. Oh, yes.

(Testimony of George H. Pinkham.)

Q. These launches? A. Yes.

Q. And they have been discovering of late years, haven't they, that these launches can use larger and larger tows, that is, they have discovered that they are more powerful than they thought they were?

A. What do you mean,—gasoline launches?

Q. Yes.

A. They keep increasing the power all the time.

Q. As a matter of fact they keep increasing the size of the tows under the power, don't they?

A. I don't know.

Redirect Examination.

Mr. HENGSTLER.—Q. Captain, when you see these lighters in tow on the bay, are they usually towed by gasoline launches or usually by steam tugs?

A. Well, the gasoline boats are getting to be the fashion now, but with big power, probably 80 or 100 horse-power or 150, some of them.

Q. Big power? A. Yes. [249]

[Testimony of H. R. Young, for Libelant (in Rebuttal).]

H. R. YOUNG, called for the libelant in rebuttal, sworn.

Mr. HENGSTLER.—Q. Mr. Young, what is your business?

A. I am Secretary of the California Stevedoring and Ballast Company.

Q. Are you familiar with the towing business in this port?

(Testimony of H. R. Young.)

A. Well, the only thing I know about it is ordering towboats for our particular line of work around the city front.

Q. When you tow lighters of the kind described—you have been here right along and heard the testimony? A. Yes.

Q. When you order the tow of lighters of the kind described here, what kind of a boat do you order?

A. Well, those two lighters of the American-Hawaiian Company—I do the work of the company, the stevedore work, and did from the time they were built, and for our own work around the bay we have regular towboat companies.

Q. Regular towboats, that means steam tugs?

A. Steam tugs.

Q. What power?

A. Well, I suppose those boats around 200 to 250 horse-power, the smallest boats they have.

Q. Have you ever ordered a tow of that kind of lighter by a gasoline launch of any power?

A. No.

Q. Would you consider a gasoline launch of 50 horse-power sufficient to handle a lighter of that kind?

A. Not around the bay where these boats are operated.

Q. Not around the bay? A. No.

Q. You don't know anything about river navigation? A. No, nothing whatever.

Q. Would you consider it safe around the bay with a gasoline launch of 50 horse-power, for the purpose

(Testimony of H. R. Young.)

of towing a lighter of that description?

A. Well, where the responsibility rested with me to get a towboat to move those boats, I would not; I [250] would get one of more power than that.

Q. Is it on account of the lesser that they have that the other boats are safer or for what reason is it?

A. Well, I think that the more power they have, and with the talent to handle them, of course, and the conditions around the wharves there, they can go in and out of the wharves at the different stages of tides, because a man sometimes wants to leave an hour or two before high water, and getting out past the end of the wharf there is a little tide running, and getting into another place to dock it at slack water, of course, to tow, we have to have good power and handle the vessel skilfully besides.

Q. How do gasoline boats compare with steam tugs as far as reliability of the machinery is concerned?

A. Well, I ain't much of an engineer, but I think that the steam tug is more reliable than the gasoline tug.

Q. Isn't it a fact that you can never be assured that the machinery of a gasoline launch will not stop at unexpected times?

A. They are known to do that.

Cross-examination.

Mr. DENMAN.—Q. You are employed by the libelant, the American-Hawaiian Steamship Company, aren't you? A. Yes.

Q. As I understand it, in handling these lighters,

(Testimony of H. R. Young.)

you were concerned with the tidal conditions around the wharves here in the bay? A. Yes.

Q. How much of a tide do you get sometimes off the east bay shore here?

A. Oh, we get—the tide runs all the way from 2 knots to 7 knots at times; it runs by there at different stages of the tide.

Q. You would not have much bother with 2 or 3 knots in handling these lighters, would you?

A. Oh, no; of course, that is hardly anything to speak of at all. We tow in a different way, you [251] know. The boat ties alongside of these lighters and it becomes a part of the lighter.

Q. But you do not think a gasoline launch would be sufficient to handle these, a gasoline launch of this size?

A. I say I would not wish to take any responsibility where I had the handling of the boat; I would get a boat I was sure I could handle her.

Q. You have a combination of difficult circumstances around these wharves, very sharp angles to get in at times, and from the swift tides passing by the wharves? A. Yes.

Q. Those are the conditions that you have to meet there?

A. We have instances where the slips are sometimes congested with different barges and different vessels there, two or three sometimes, and there is just room for a barge and boats to get in and out.

Q. Your method of towage is to put your power next to your tow? A. Yes.

(Testimony of H. R. Young.)

Q. By side-laying towing, isn't it? A. Yes.

Q. And it really is making them all one beam?

A. Yes, they are packing like one boat then.

Q. Do you know what the draught of these barges was, fully loaded? A. Which ones?

Q. "Number One."

A. I think they are a little bit scant of 10 feet 8; fully loaded it would be 7½ to 8 feet.

Q. Fully loaded about 7½ feet draught?

A. Yes.

Q. Suppose they are loaded down to 6 feet, is that anywhere near the capacity?

A. Oh, no, they load deeper than that I should imagine.

Q. So a load that made a draught of 6 feet on the lighters would be a comparatively light load, would it not? A. Oh, yes.

Q. How much have you put on them as your maximum? [252]

A. Well, when these barges were built I was told I could load them to 700 tons.

Q. To 700 tons?

A. Yes, and on different occasions I have loaded them to 700 tons.

Q. What would they draw then?

A. Well, I never measured it exactly, but I suppose she would have about 2 feet freeboard.

Q. That would be about 8 feet?

A. About 8 feet. It all depended on the kind of shipment, what the shipment was; we used to sometimes have four or five or 600 tons on them, what-

(Testimony of H. R. Young.)

ever a shipment was, that we had to move away from a steamer, we would put on.

Q. Well, the decks did not collapse with these 700 tons, did they? A. No.

Q. Did not show any signs of collapsing?

A. No, we watched that, of course, all the time we were loading them, to see if they showed any sign of weakness of any kind or made any water, so that we could know that there is nothing the matter with them.

Q. Now, if she would not collapse when she was drawing 8 feet, she would not collapse when she was drawing 6?

A. I know she did not collapse at that time, and I should not imagine so.

Q. Did you examine this barge at the time that this accident happened? A. No.

Q. Did you go up to Napa Creek? A. No.

Q. You did not have anything to do with that?

A. No.

Q. By the way, how were the lighters shaped forward, with a square box or did they have—

A. (Intg.) They were pretty square; they had a little breadth of overhangs maybe, from the bottom of the water to the top of the box, 4 or 5 feet, nothing to speak of, practically a square box. [253]

Q. The ordinary shape of lighters?

A. The ordinary shape of lighters. They were built by Turner's Shipyard up there opposite Benicia.

Q. Well, they were of the usual type of lighters

(Testimony of H. R. Young.)

that are used on this bay and all its tributaries for the carrying of heavy freight and merchandise?

A. Yes.

Q. You are familiar with the figuring on weights of cargoes, aren't you? You have to, to a certain extent? A. Yes, I am.

Q. When you figure the weight of a cubic yard of gravel, how much do you figure on?

A. I think about 2,500 lbs.

Q. Suppose you have 400 cubic yards in a vessel, that would make about how many tons? 400 cubic yards would be about a little under 500 tons, would it not? A. It would be around 500 short tons.

Q. That ought to bring her down to about 6 feet of draught, ought it not?

A. I think about that, yes.

Q. When you put on this heavy load of 700 tons you were employed by the American-Hawaiian people were you not?

A. Yes, I am still employed by them.

Q. That is, for the owners?

A. Yes, I had charge of all the loading and discharging of all their vessels.

Redirect Examination.

Mr. HENGSTLER.—Q. Mr. Young, are you employed by Bennett & Goodall in any capacity?

A. No. Bennett & Goodall are interested in our stevedoring company but I am not in their employ at all.

Q. Captain Goodall is interested in the same business? A. Yes, they are both interested.

(Testimony of H. R. Young.)

Q. The same business, your common business?

A. Yes.

Q. And Captain Bennett also? A. Yes. [254]

Q. Captain Bennett and Captain Goodall?

A. Yes.

Q. They are practically partners in that business?

A. Yes, we are interested together in that stevedoring business.

Q. So you do not consider that you are influenced by the fact that the American-Hawaiian Steamship Company employs you? A. No, sir.

Q. Or makes you an interested witness?

A. No.

Q. Just telling the facts here simply, are you not, Mr. Young? A. Yes.

Mr. DENMAN.—We concede he is not an interested witness.

Mr. HENGSTLER.—I did not see why you asked those questions about his employment.

Mr. DENMAN.—I wanted to find out who authorized the loading of that barge, that is all. That is the only thing I was asking about.

Mr. HENGSTLER.—We rest, your Honor.

**[Testimony of E. F. Pigott, for Respondent
(Recalled in Surrebuttal).]**

E. F. PIGOTT, recalled for the respondent in surrebuttal.

Mr. DENMAN.—Q. Mr. Pigott, how long does it take—I don't know whether I asked you this question—for the flood tide to reach from Golden Gate up to the upper reaches of Napa Creek?

(Testimony of E. F. Pigott.)

A. About three hours.

Q. Now, do you remember coming up the creek shortly after this barge was wrecked there?

A. I do.

Q. Can you tell at what angle she was lying when you saw her?

A. That is pretty hard; it would be a rough guess at it; probably at an angle of 10.

Q. 10 degrees? A. Yes.

Q. Considerable of an angle? A. Yes. [255]

Q. Enough to throw side stresses on her of her cargo? A. Yes.

Q. Do you think that that angle was sufficient to have made that deckload the cause of her breaking up?

A. That depends entirely on the construction of the ship.

Q. But she was at *much* a heavier angle than she would be under ordinary towing conditions?

A. Yes.

Cross-examination.

Mr. HENGSTLER.—Q. You say it is a rough guess, is it, Captain, that angle?

A. Yes, it is a rough guess.

**[Testimony of James H. Bennett, for Respondent
(Recalled in Surrebuttal).]**

JAMES H. BENNETT, recalled in surrebuttal.

Mr. DENMAN.—Q. Captain, when you testified on the opening of the case, you said you visited the boat the day after the accident?

A. I visited her the morning after the accident.

(Testimony of James H. Bennett.)

Q. And that you found her then broken up and that she was lying at an angle towards the center of the stream? A. Yes.

Q. I did not ask you how much of an angle that was. But was it more than the angle that she would get in the ordinary course of her navigation?

A. Oh, yes, much more; I should imagine that she was between 10 and 11 degrees of an angle.

Q. Can you fix that one degree in your mind so accurate?

A. I can according to the list of ships up to about 15 degrees; I think I am in a position to tell pretty near to a degree because of the watching the loading of ships and their lists in loading and unloading, having an estimate you can tell, and I think between 10 and 11 and 12 at the most.

Q. Now, what familiarity have you with the loading of ships? Are you engaged in that business?

A. Yes.

Q. What is the name of the company that you are interested in?

A. The California Stevedoring & Ballast Company. [256]

Q. That is one of the largest of the stevedoring companies here, is it not? A. Yes.

Q. How long have you been in that business?

A. The company was incorporated, I think, in '92 or '93. I was in business under the name of Bennett & Goodall previous to that.

Q. And your business is stevedoring, ballasting and trimming of ships? A. Yes.

(Testimony of James H. Bennett.)

Q. The trimming of ships is a necessary part of the conduct of your business, is it not?

A. Yes, it is.

Q. Do you recollect whether or not you had any conversation with the American-Hawaiian people regarding the sub-charter of this barge?

A. Well, I did not; Captain Goodall did.

Q. What was that; do you know?

Mr. HENGSTLER.—Now, I object to this if your Honor please. It is decidedly improper; I object to it as to what Captain Goodall did.

Mr. DENMAN.—You admit, do you not, Doctor, that that sub-charter was made with the permission of your company?

Mr. HENGSTLER.—I admit that.

Mr. DENMAN.—Q. Let me ask you, 10 or 11 degrees is much more than those barges get in the ordinary course of their navigation, is it not?

A. Oh, yes; it is much more list; while they are loading or unloading they might list some, but in getting them ready to transport a cargo, why they would not be over 2 or 3 degrees list.

Q. So that this is an unusually heavy list for the boat? A. Yes, sir.

**[Testimony of William Fisher, for Respondent
(Recalled in Surrebuttal).]**

WILLIAM FISHER, recalled for the respondent in surrebuttal.

Mr. DENMAN.—Q. Mr. Fisher, I want to ask you a couple of [257] questions that I forgot to ask you. You remember I was asking about the char-

(Testimony of William Fisher.)

acter of craft that was used for carrying this gravel and I used several times the term "barge." Now, all those crafts are lighters, aren't they, that is to say, they have no steering apparatus? A. Yes.

Q. No steering apparatus? A. No.

Q. They are simply square wooden boxes, aren't they?

A. Yes, practically. A little run on each end.

Q. About the same type as lighter "Number One" and "Number Two"?

A. Well, I don't know just what type that "One" was. I did not pay much attention to that, but I should judge about the same thing.

Q. Now, let me ask you: In coming down that creek, do you regard that it would be dangerous to take such a barge as we have here, such a lighter as lighter "Number One" drawing 6 feet of water—would you regard it as dangerous to take her around any of those bends in the first half of the tide?

A. No, sir.

Q. Of the ebb tide? A. No, sir.

Q. About how long does it take for the tide at flood to reach from the Golden Gate to the upper reaches of the Napa Creek? A. That is up near Napa?

Q. Yes. A. About three hours, I should judge.

Q. About three hours? A. Yes, sir.

Q. So your calculation is that she should leave about between two and three hours before high tide?

A. Well, where we were working it was about two hours, and we used to leave about two hours at the head; that would give us two hours to Suseol; from

(Testimony of William Fisher.)

there to Napa makes another hour; that was before the Rocky Reach was taken out of there; but since the rocks have been taken out, why, as long as there is plenty of [258] water to float the barge, we start at any stage of the tide, on the ebb tide.

Q. So that the thing that bothered you was not the rapidity of the flow of the tide? A. No.

Q. But the fact that the rocks did not give you draught enough to come through? A. Yes.

Q. And the tide flowing merely with the rocks removed, you could go through it anyhow?

A. Yes, as long as there is plenty of water.

Q. What can you say as to the speed of the water in that creek; does it ever attain a high speed?

A. Yes, when there is a freshet.

Q. In the absence of a freshet, do you have any high speeds of water there? A. No, sir.

Q. What is the highest rate of tide you have ever encountered outside of any freshets?

A. Well, I think on a pretty large run-in of the ebb, after you get down the creek quite away, at the end of Suscol Creek, about two miles.

Q. What do you think the highest rate of tide you would be likely to strike would be in Horseshoe Bend?

A. I should judge maybe a mile and a half to a mile and three-quarters.

Q. A mile and one-half?

A. With a big run-up, I should judge that would be pretty close to it.

Q. That would be your maximum? A. Yes.

(Testimony of William Fisher.)

Q. At the middle of ebb tide or after, the highest rate of speed? A. Yes.

Q. But not before the middle of the ebb?

A. No, I don't think so.

Q. The first three hours of the ebb the tide is rather sluggish [259] there, isn't it? A. Yes.

Q. Now, suppose you are loading a mile below the Suscol wharf and it is high tide at the head at 10:38, what time would you consider the proper time to leave to come down that creek with such a lighter as lighter "Number One" and with the "Pickett"?

A. Well, before the rocks was taken out or since?

Q. Before the rock was taken out.

A. I would leave at high water at the head.

Q. That would be somewhere around 10:38?

A. Yes.

Q. You would have to buck some tide, wouldn't you, going out? A. Yes.

Q. The first portion of your trip would be quite slow, wouldn't it? A. Yes.

Q. You would gradually after the tide passed go more rapidly? A. Yes.

Q. Might take a couple of hours to go down if there was a heavy tide to buck?

A. If there was a very heavy tide.

Mr. HENGSTLER.—To go down how far?

Mr. DENMAN.—To go down to the bend?

A. Well, I don't think it would take hardly that long, not down to the bend from below the Asylum wharf, except you are running at very slow speed, very carefully coming around the bends.

(Testimony of William Fisher.)

Mr. DENMAN.—If you were very careful coming around the bend it might take a couple of hours?

A. Yes, take a couple of hours.

Cross-examination.

Mr. HENGSTLER.—Q. You admit that it is quite a great care to get around those bends, do you not?

A. Well, yes, we always watch for the bends when we come to them.

Q. By saying then that they are not dangerous, you mean that [260] they are not dangerous for a man of your experience and skill?

A. For a man that has had experience in the creeks why, we don't slow up at all coming to the bends, not since they took the **Rocky Reach** out of there.

Q. Don't slow up at all since they have taken the rocks out of there? A. No.

Q. It does not make any difference whether it is light or dark when you pass through there?

A. Well, it is easier to pass through, as far as day and night is concerned, it is easier to pass through in the daytime; you can see farther ahead. But we don't find any trouble in coming through after dark.

Q. But it is more dangerous, is it not, in the dark; in a dark night than it would be in the daytime or on a clear night?

A. Well, I could not say much about that part of it; you can't see as far ahead, that is the only difference.

Q. You would not consider it dangerous in the darkest night?

(Testimony of William Fisher.)

A. No, we come down at any time; it don't make any difference how dark it is as long as there is no fog.

Q. Fog is the only thing that makes it dangerous?

A. Yes.

Q. Do you know the difference between a barge and a lighter? A. Yes.

Q. What is the difference?

A. Well, a barge has steering apparatus while a lighter has not got any.

Q. Is that the only difference?

A. Well, that is about the main part of it.

Q. Isn't it a fact that the lines of the two are different, so that one of them is the more easily managed than the other?

A. I have seen them built on about the same lines; I have seen them back on the lakes where they took the steering gear off and pulled them lighters afterwards. [261]

Q. That was on the lakes? A. Yes.

Q. Did you know lighter "Number One" that belonged to the American-Hawaiian?

A. No, I can't say that I did. I saw them over in Oakland Creek, but I would not know them one from the other.

Q. Have you ever seen it, Lighter No. 1?

A. Not that I know of. I saw both anchored over there, but I would not know whether it was "Number One" or what number it was.

Q. You know that it was one of the two, either lighter "Number One" or "Number Two" of the

(Testimony of William Fisher.)

American-Hawaiian Steamship Co.?

A. Well, I saw the name on them, American-Hawaiian Steamship Company, but I didn't look at the numbers.

Q. You would be very much surprised to learn, wouldn't you, that neither one has got the name of the American-Hawaiian Steamship Company on?

A. It has those letters on, they claimed it had when we was going up.

Q. At any rate you only got a passing glimpse of that lighter?

A. Yes, and they said it belonged to the American-Hawaiian Steamship Company.

Q. When was that?

A. That was quite awhile ago, before I towed up on the creek.

Q. You were not interested in the lighter?

A. No.

Q. You don't know the type of that lighter, do you?

A. I couldn't say anything about that, no.

Mr. DENMAN.—We rest.

Mr. HENGSTLER.—That is all.

Testimony closed. [262]

Monday, January 15th, 1912.

Mr. HENGSTLER.—If your Honor please, in this case I should like to make a statement at the present time. In the course of the trial I was called upon by counsel on the other side to make an admission with reference to the relation between the libellant and the Napa Gravel & Material Company. At

the time I made an admission, I believe, to the effect that sometime before the accident the American-Hawaiian Steamship Company, the libelant knew of the sub-charter by Bennett & Goodall to the Napa Gravel & Material Company. I did so for the purpose of expediting the trial although as a matter of fact I did not know whether that was the fact or not. The manager of the American-Hawaiian Steamship Company has been out of town sick, but has returned, and I have since ascertained that he never knew of the sub-charter until after Mr. Bennett told him, after the accident had happened. For that reason I would ask your Honor for permission to withdraw any admission that I made during the course of the trial, especially by reason of the fact that I have noticed in Mr. Denman's argument that the admission is being used in a somewhat unexpected manner, which will introduce complications in the case. I ask for leave to withdraw any admission made by myself with reference to the fact, as I have ascertained the fact to be otherwise, in the meantime.

Mr. DENMAN.—We cannot consent to that, if your Honor please. We have closed our case on the theory that this was the fact. I called on my opponent for the purpose of knowing, and I expected to use it on my argument as part of the case. Unless the case is reopened and the trial resumed for that purpose I cannot consent to the withdrawing of the admission.

The COURT.—If the admission be withdrawn the trial will have to be reopened. You will have to have

an opportunity to present the question upon that.
[263]

Mr. DENMAN.—If it is to be reopened there should be a showing of some kind made.

Mr. HENGSTLER.—It was a statement on my part made out of good nature and for the purpose of expediting the trial at the time, being satisfied that it made no difference whether at some time the libellant knew about this sub-charter. In the meantime, however, I have noticed in the argument that it is being used very seriously and introduces new points of law. For that reason I inquired about the fact and found out that the fact is otherwise; that the American-Hawaiian Steamship Company did not know anything about the sub-charter until after the lighter was lost.

Mr. DENMAN.—Whom did you consult, Dr. Hengstler?

Mr. HENGSTLER.—Mr. Cook.

Mr. DENMAN.—Anybody else?

Mr. HENGSTLER.—Mr. Cook is the man who made the contract. He is the manager of the American-Hawaiian Steamship Company in this port.

Mr. BELL.—I understood, if the Court please, that Captain Goodall was to have been brought here as a witness, and that when this admission was made he was not brought here for the purpose of testifying to some facts and circumstances that would indicate that the American-Hawaiian Steamship Company did know of the sub-charter to the Napa Gravel & Material Company. I am not personally informed on that. I think Mr. Cooper, one of the proctors,

and Mr. Denman, know of it.

Mr. HENGSTLER.—I admit your right to call him now and the trial would not be retarded thereby, because the same time would have been consumed had he been called before.

Mr. COOPER.—The only trouble with calling him now is that Captain Goodall who arranged this matter with Mr. Cook [264] represents the Pacific Navigation Company in Los Angeles, who are operating the “Yale” and “Harvard,” he having the Los Angeles point and Captain Bennett the San Francisco point. It will take some little time to get him here, but I will state to your Honor I understood from Captain Goodall that prior to the execution of this sub-charter, Captain Goodall had discussed the matter with Mr. Cook and Mr. Cook was aware of it, and it was at Mr. Cook’s suggestion that the bond was taken from the sub-charterer. That is my understanding of the facts as claimed by Captain Goodall. He has been East for sometime and I have not discussed it with him recently. He has just returned and came up from Southern California to be present.

The COURT.—Is he in the city now?

Mr. COOPER.—I think not. He could be got here in a day or two.

The COURT.—I think the case had better be submitted now on the record as it stands, with this last statement of Dr. Hengstler’s in the record, whatever it may be considered worth. I cannot delay the case now.

[Endorsed]: Filed Jan. 23, 1912. Jas. P. Brown,
Clerk. By Francis Krull, Deputy Clerk. [265]

*In the District Court of the United States in and for
the Northern District of California.*

AMERICAN-HAWAIIAN STEAMSHIP COM-
PANY,

Libelant,

vs.

BENNETT & GOODALL, NAPA GRAVEL &
MATERIAL COMPANY, and AMERICAN
BONDING COMPANY OF BALTIMORE,
Respondents.

Deposition of J. P. Lattimore.

BE IT REMEMBERED that on Wednesday,
March 30th, 1910, pursuant to stipulation of counsel
hereunto annexed, at the office of L. T. Hengstler,
Esq., in the Kohl Building, in the City and County
of San Francisco, State of California, personally ap-
peared before me James P. Brown, Esq., a United
States Commissioner for the Northern District of
California, to take acknowledgments of bail and affi-
davits, etc., JOHN P. LATTIMORE, a witness pro-
duced on behalf of the libelant.

L. T. Hengstler, Esq., appeared as proctor for the
libelant. Edwin T. Cooper, Esq., and Sheldon C.
Kellogg, Esq., appeared as proctors for the respond-
ent Bennett & Goodall, and Theodore A. Bell, Esq.,
appeared as proctor for the respondents Napa Gravel
& Material Company and American Bonding Com-

pany of Baltimore, and the said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth. [266]

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of John P. Lattimore may be taken *de bene esse* on behalf of the libelant at the office of L. T. Hengstler, Esq., in the Kohl Building, in the City and County of San Francisco, State of California, on Wednesday, March 30th, 1910, at 2 o'clock P. M., before James P. Brown, Esq., a United States Commissioner for the Northern District of California, and in shorthand by Clement Bennett.

It is further stipulated that the deposition, when written out, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the reading over of the testimony to the witness and the signing thereof is hereby expressly waived.) [267]

JOHN P. LATTIMORE, called for the libelant, sworn.

Mr. HENGSTLER.—Q. What is your age and occupation, Captain?

(Deposition of J. P. Lattimore.)

A. My age is 25 years; my occupation is gasoline engineer and captain.

Q. What was your occupation in April, 1907?

A. I don't know exactly the date, if that is the date when I was in the launch. Was that the date?

Q. Yes. What was your occupation at that time?

A. At the time of the accident I was captain and engineer of the gasoline launch "Pickett."

Q. Do you remember that on April 11th, 1907, you had the American-Hawaiian Steamship Company's barge No. 1 in tow in Napa Creek?

A. Yes, sir; I guess that was the date all right.

Q. That was the date, the 11th of April?

A. Of course, I am not sure about the date.

Q. Whereabouts in Napa did you first take her in tow?

A. I don't know the name of the bend but it was below the asylum's wharf; of course, you have names for those bends and I have different ones.

Q. It does not make any difference about the names of the bend. You say it was below the asylum's wharf? A. Yes, sir.

Q. About what distance, as far as you can judge, below the wharf of the asylum, as far as you know, a mile or a few hundred feet?

A. I could not just exactly say now whether it is a mile or mile and a half or two miles; something like that.

Q. What was the condition of the barge at the time with reference to being light or loaded?

(Deposition of J. P. Lattimore.)

A. What was the condition? [268]

Q. The condition of the barge with reference to being light or loaded? A. When I was towing?

Q. Yes, when you took her in tow?

A. She was loaded.

Q. What was she loaded with?

A. She was loaded with gravel.

Q. Did she have a full load on?

A. Yes, sir, as far as I could see.

Q. Do you know whether or not the barge has any steering gear?

A. There is no steering gear on the barge.

Q. About what time of the day was it that you took her in tow? A. Something around 10 o'clock.

Q. In the morning, or in the evening?

A. In the evening.

Q. What was the state of the tide at the time?

A. It was flood tide, if I am not mistaken; I am pretty sure it was flood tide.

Q. Have you any idea how near it was the turn of the tide?

A. No, sir; I did not take much notice of that.

Q. Do you use the tide in towing a barge down Napa Creek? A. Yes, sir.

Q. In what way?

A. To help it along to get down.

Q. When do you start as a rule, with reference to the condition of the tide?

A. Do you mean with a loaded barge like that?

Q. Yes.

A. You generally start about high water.

(Deposition of J. P. Lattimore.)

Q. About high water?

A. Yes, sir, or a little before; it does not matter.

Q. In what way do you use the tide in towing her down the creek?

A. Which way do you use the tide?

Q. Yes.

A. You leave your destination about high water or something like that.

Q. Why?

A. As close to high water as you can, and then you start down the creek; the further you come down the creek [269] naturally the quicker you get the ebb tide.

Q. In other words, you use the ebb tide to take her down the creek?

A. Not exactly. It helps you along a good deal.

Q. Now, how far did you get with your tow before anything of any note occurred?

A. To that bend that I have understood to be called Horseshoe Bend.

Q. What occurred at that bend?

A. The barge took a sheer starboard and I made an effort to pull her away from the starboard bank; whether it was an eddy, or what it was, she took a sheer to port. When I got the boat around and I got her clear of the starboard bank, I straightened her up, and whether it was an eddy or what it was, I don't know, she took a sheer to port and she went ashore and pulled the barge with her.

Q. What effort did you make to keep her from the port shore?

(Deposition of J. P. Lattimore.)

A. I made all the efforts that I could at that time. There was something, whether it struck the wheel at that time I could not tell.

Q. You mean whether the barge struck the wheel or not?

A. No, sir, not the barge; whatever it was; it was a dark night and I could not see what it was. The way the barge took her sheer, it might have been the stump of a pile hit the wheel, the propeller.

Q. Did you make any change in your wheel for the purpose of keeping the barge off the port bank?

A. Yes, sir; I brought her up to straighten her up.

Q. What do you mean by straightening her up?

A. Straightening the boat up.

Q. To get her over towards starboard?

A. Yes, sir, get her [270] **straight up**. When I come down like that, after I get my barge, she will come behind me; I **straighten my boat up again**.

Q. How was the barge fastened to the tug?

A. She had a bridle, or what they call two lines, one to each bitt.

Q. One to each bitt on the barge, do you mean?

A. Yes, sir.

Q. Where are those bitts on the barge?

A. They are on each corner of the barge.

Q. There was a hawser out to each one of the bitts?

A. Yes, sir.

Q. From the launch? A. Yes, sir.

Q. Whereabouts are those hawsers fastened to the tug? A. On the tow-bitts.

Q. They are in the stern of the tug, are they not?

(Deposition of J. P. Lattimore.)

A. Yes, sir—not in the stern, but pretty well aft.

Q. Did you have anybody on board of your tug looking out for the hawsers? A. Yes, sir, a man.

Q. Do you remember what his name is?

A. No, sir, I do not.

Q. Was there anybody on board of the barge at the time? A. Yes, sir.

Q. How many people? A. One man.

Q. What was his business?

A. He was the barge tender.

Q. About how long were those hawsers?

A. About, I should judge, 20 or 30 feet; something like that.

Q. Did they belong to your tug?

A. Yes, sir. I am pretty sure they belonged to the tug. That is something I don't remember because there are times when we take other lines.

Q. What is the condition of the creek as you come down just before you reach the bend where she went on shore? A. There is a reef running across there.

Q. A reef on which side? A. On the port side.
[271]

Q. On the port side in coming down?

A. Yes, sir.

Q. Is the reef visible to the eye as you come down?

A. At high water?

Q. Yes. A. I am not sure whether it was or not.

Q. You knew about it being there?

A. Yes, I knew about it.

Q. How did the fact that you knew about the reef being there influence your navigating the tug at that

(Deposition of J. P. Lattimore.)

point? A. I don't understand you.

Q. You know that the reef is there?

A. Yes, sir.

Q. What do you do as you come down the reef?

A. You keep to the starboard bank.

Q. You try to avoid that reef? A. Yes, sir.

Q. And you did that night? A. Yes, sir.

Q. Do you think you did your best to keep to the starboard with your tug that night, Captain?

A. Yes, sir.

Q. Did you say that the barge sheered to starboard just before you reached the bend? A. Yes, sir.

Q. What was that due to, why did she sheer to starboard, as far as your judgment goes?

A. All barges will sheer more or less. All barges will take a sheer more or less.

Q. Yes, but why did she sheer to the starboard at that place, do you suppose? You may not know. If you do not know it, say so.

A. I should judge it was an eddy. I don't know exactly what would make her sheer. I should think it would be an eddy.

Q. About what time of the night was it that the barge went ashore there?

A. About 2 o'clock, I should judge. Of course, I could not say just exactly what time it was.

Q. You said that the barge pulled your launch also? A. Yes, sir. [272]

Q. What did you do then with the launch?

A. I hove her off.

Q. Did you have any difficulty in heaving her off?

(Deposition of J. P. Lattimore.)

A. Yes, sir.

Q. How long did you work on her before you got her off?

A. I could not say exactly now how many minutes it was.

Q. About? Was it an hour, or less?

A. It was less than an hour.

Q. What did you find with reference to the condition of your launch after you had succeeded in getting her back in the creek?

A. I found that the rudder was out of condition and one of the blades of the propeller was gone.

Q. What, if anything, did you do in order to get the barge afloat?

A. I could not do very much of anything, being that the tide was falling pretty quick.

Q. Did you try to get the barge afloat?

A. That I don't remember now.

Q. You do not remember whether you pulled on her after you were afloat with your tug?

A. No, sir, I don't remember.

Q. What did you do with the launch after that, Captain?

A. I moored her alongside of the barge.

Q. Why did you not go down the creek with her?

A. It was so late in the morning, I did not know where I could go to get a telephone.

Q. Could you have navigated the launch if you had wanted to at that time, or did you have to moor her?

A. There was water enough there to navigate her,

(Deposition of J. P. Lattimore.)

but I don't remember now whether I could have steamed her off or not.

Q. You say her rudder was out of commission, didn't you? A. Yes, sir.

Q. Would it be possible to navigate her without a rudder, or with the rudder out of commission as it then was? A. Running light; yes. [273]

Q. What do you mean by running light, running without the tow? A. Without anything.

Q. Would it have been safe to go down the creek with your launch in that condition?

A. It would not be very safe.

Q. And was not that the reason why you moored, because you felt that it was not safe?

A. Well, yes, I did.

Q. That was your reason for mooring alongside?

A. Yes, sir, more or less.

Q. What other reason did you have?

A. That was the idea of my mooring alongside. It was a very dark night, and my rudder was out of commission, and naturally that was all I could do, to moor alongside the barge.

Q. What happened to the barge after that, as long as you were there? A. She fell to pieces.

Q. About what time was that, Captain?

A. It was in the morning about 7 o'clock, something like that.

Q. When did you make the repairs to your launch, to the rudder?

A. Well, I don't know now; I don't remember just when it was.

(Deposition of J. P. Lattimore.)

Q. Did you repair her there on the spot while you were there at all?

A. We fixed her so that she could run down.

Q. After she was refitted and fixed up again, and after the rudder was in condition so that you could use the rudder, what did you do with your launch?

A. Are you referring to when she came down here?

Q. Yes.

A. After the repair was all done to her down here?

Q. No, not down here; after you fitted up the rudder up there, I suppose you took her down here?

A. Yes, sir.

Q. Now, have you ever towed the same barge up or down Napa Creek [274] before this occurrence?

A. If I am not mistaken, I have towed that barge.

Q. Up or down, if you remember?

A. If I am not mistaken, I think I towed it both ways.

Q. How far up had you towed her before this time, how far up the creek?

A. To this bend I knew as Horseshoe Bend.

Q. Right up to this bend?

A. Not to the place where the barge was wrecked, but just the bend below that, or the turn below that.

Q. Will you come over here and look at this map of San Pablo Bay and fix the place where she went aground?

A. This is the mark here where she went aground.

Q. Pointing at a point marked capital "A" and a cross? A. Yes, sir.

(Deposition of J. P. Lattimore.)

Q. Where is the place to which you had taken the barge before, Mr. Lattimore?

A. Right about in here, in here some place (pointing).

Q. Pointing to a place marked capital "B" and a cross? A. I would not say it was there exactly.

Q. But about approximately in that stretch that is marked capital "B"? A. Yes, sir.

Mr. COOPER.—It is an approximation.

Mr. HENGSTLER.—Yes.

Q. Now, you had taken the barge from that place capital "B" before when she was loaded with gravel, had you? A. That is where I took her from, yes.

Q. Loaded with gravel, going down the creek?

A. Yes, sir.

Q. Had you ever taken that barge as high up the creek as the point marked capital "A" before?

A. No, sir.

Q. Or any other barge of the same size?

A. No, sir.

Q. When you took these barges loaded with gravel down the creek, how far down did you take them with your launch? [275]

A. I took one down to a wharf called the Earle Wharf.

Q. Where is that wharf, the Earle Wharf?

A. Just above Vallejo.

Q. Marked capital "C"? A. Yes, sir.

Q. And what did you do with her at that place?

A. Tied her to the wharf.

Q. And in the case of other barges, did you take

(Deposition of J. P. Lattimore.)

them to this wharf, or to other places?

A. I was the only launch up there that was towing these barges.

Q. Were there any tugs up there that were towing barges? A. Yes, sir.

Q. What tugs were there?

A. There were several. I don't just remember what tugs there were now.

Q. How high up in the creek did the tugs take the barges? A. Well, I don't remember that.

Q. About? With reference to the Horseshoe Bend, as you call it, as high up as the Horseshoe Bend? A. I don't remember that.

Q. Had you ever seen a tug as high up as Horseshoe Bend in Napa Creek?

A. If I am not mistaken, I have seen the tug "Elsie" up that high.

Q. When you saw her did she have in tow a barge?

A. I cannot remember that.

Q. Try and remember; if you saw the tug you probably would have seen if she had a tow?

A. I am not saying whether I did or not see her. I ain't sure whether I seen her or not.

Q. You think you have seen the "Elsie" as high up as Horseshoe Bend?

A. If I am not mistaken, yes.

Q. Have you ever seen the "Walter Hackett" as high up as the Horseshoe Bend?

A. The only time I ever seen her up that high was the morning she came up.

Q. What morning was that?

(Deposition of J. P. Lattimore.)

A. The morning that the barge fell to pieces.
[276]

Q. What did she come up there for?

A. I don't know; I could not tell you that.

Q. You don't know?

A. I could not tell you what she came up there for. It is my opinion, I was supposed to meet him, and he did not see me come, so he kept on coming up.

Q. You were supposed to meet him?

A. Yes, sir.

Q. At what place should you have met the tug "Walter Hackett" approximately?

A. Any place at all on the way down.

Q. Why did she meet you as you were coming down with the barge?

A. So that she could take her away from me.

Q. So that she could take her away from you?

A. Yes, sir.

Q. And to tow the barge the rest of the distance to her place of destination? A. Yes, sir.

Q. Where did the tugboat usually meet you, about what place or places in the Napa Creek?

A. One time at the Earle Wharf. I remember, and one time inside of the bridge.

Q. Inside of what bridge?

A. The Napa Bridge.

Mr. BELL.—The Santa Rosa drawbridge?

Mr. HENGSTLER.—That is the railroad bridge between Napa Junction—what is the place on the other side?

Mr. BELL.—Buckley. It is on the Santa Rosa

(Deposition of J. P. Lattimore.)

branch of the Southern Pacific.

Mr. HENGSTLER.—Q. You understood when you towed the barge that you would tow her until you met the tugboat and then deliver her over to the tugboat and go back up the river again? That was the idea, was it not?

A. I would not have come down to San Francisco with her; I would have come to the Earle Wharf and tied her up.

Q. Unless you met this tugboat before you got to the Earle Wharf? [277]

A. If I met her before I got to the Earle Wharf he would take her from me.

Q. You have some idea, have you not, of leaving the city and county and going to Honolulu in the near future? A. Yes, sir.

Cross-examination.

Mr. COOPER.—Q. How long had you been in this occupation prior to this accident, about how long?

A. Are you referring to the boating business?

Q. Yes, engineer and captain?

A. About 7 or 8 years.

Q. How long have you been master of the "Pickett"? A. I don't remember.

Q. About how long? A. About a year.

Q. Been pretty active in that management during that time, taking her up and operating her?

A. Yes, sir.

Q. During that time? A. Yes, sir.

(Deposition of J. P. Lattimore.)

Q. Were you not doing at this time what is known as tide work? A. Yes, sir.

Q. What does that mean?

A. That means that she was to leave on the tide.

Q. You say the condition of the tide at the time you left Napa, or the upper portion of the creek nearest to Napa, was about flood tide? A. Yes, sir.

Q. Was that the most favorable tide for your operation? A. I say it was very high water.

Q. Was that the most favorable condition of the tide for coming down the stream with that tow?

A. Yes, sir.

Q. You waited for that, did you? A. Yes, sir.

Q. How many trips had you made prior to this time with this barge or her sister barge in the same tow up or down the [278] creek?

A. Three or four times or five.

Q. Up and down the same creek? A. Yes, sir.

Q. Napa Creek? A. Yes, sir.

Q. You pointed out a place here where you had been before (pointing). A. Yes, sir.

Q. B cross? A. Yes, sir.

Q. Are you not mistaken in that? Did you not go further up the stream than that, much nearer to A cross than B cross, as indicated on this map? Did you not go nearer to A cross than B cross indicates?

A. I don't know.

Q. It is your general idea? A. I could not say.

Q. How far away were you on the prior trip from A cross in distance, 100 yards or mile or half a mile?

(Deposition of J. P. Lattimore.)

A. I could not just exactly say.

Q. Is it just around the next bend? A. Yes, sir.

Mr. HENGSTLER.—That is what he has got here, just around the next bend.

Mr. COOPER.—Q. What are the relative conditions of the two bends; is there any practical difference? A. Not that I know of.

Q. Is it just as easy to navigate in one bend as another?

A. Yes, sir, as far as my knowledge is concerned.

Q. Do you know the depth of the water at low-water mark at Horseshoe Bend, where the accident happened; about how deep it is?

A. From what the chart says, about 8 or 9 feet of water.

Q. What draught did the barge have and the tow, about? A. About 6 feet of water.

Q. How big was the barge, do you remember; how wide was she, about? A. About 30 feet wide.
[279]

Q. How long?

A. I should say a hundred or over; something like that.

Q. Have you any idea of the width of the creek at the bend there? A. No, sir.

Q. About?

A. About 300 feet; something like that.

Q. Had you two lines running to the bitts on the barge, that is, running from the tow to each corner?

A. Yes, sir.

Q. Is that the usual number of lines you have in

(Deposition of J. P. Lattimore.)

towing a barge of this description? A. Yes, sir.

Q. That is the way you towed them before?

A. Yes, sir.

Q. You had traveled a considerable distance down the creek before this accident happened that night?

A. Yes, sir.

Q. How long had you been gone, an hour or two, or more?

A. I could not exactly say now, an hour or two or more.

Q. Is it not a fact that you started about 10 o'clock, or began to start about 10 o'clock, and not finding the tide conditions most favorable you stayed a couple of hours until the tide conditions were most favorable; is that not your recollection?

A. I towed down slow.

Q. At the most favorable tide? A. Yes, sir.

Q. You had gone a considerable distance before this accident happened, down the creek?

A. Yes, sir.

Q. Suppose the accident had not happened, did anything happen to the tow besides breaking or injuring her rudder?

A. Yes, sir, the wheel was broke; the propeller was broke.

Mr. HENGSTLER.—You mean to the tug?

Mr. COOPER.—Yes, to the tug.

Q. If the propeller-wheel had not been broken and these injuries had not happened to you at this time, would she [280] have gone ashore?

A. I don't think she would have gone ashore.

(Deposition of J. P. Lattimore.)

Q. Could you have pulled the barge off?

A. Yes, sir.

Q. Without any trouble, as far as you know?

A. As far as my navigation is concerned, I think I could.

Q. How many crew did you have on the tug this trip? A. Two men—myself and a man.

Q. How many do you usually carry?

A. Just myself and another man.

Q. How many did you carry on these prior trips?

A. Just myself and a man.

Q. That is the regular number? A. Yes, sir.

Q. There was a man on the barge in this instance?

A. Yes, sir.

Q. Is there a man usually on the barge?

A. No, sir.

Q. Not usually? A. No, sir.

Q. In this instance there was a man acting as barge tender? A. Yes, sir.

Q. Was she loaded as usual, as far as you know?

A. As far as I could judge, yes.

Q. You say that you do not remember trying to pull her off; did you not do the best you could to pull her off that night? A. I don't remember that.

Q. You don't remember what you did?

A. No, sir.

Q. But you remember that you tried, didn't you? Did you or not try to pull her off?

A. If I am not mistaken, I did; I am not sure now.

Q. You tried to save the barge?

A. Certainly I did.

(Deposition of J. P. Lattimore.)

Q. You did everything in your power that was suggested at that time to save her? A. Yes, sir.

Q. About this reef; where is this reef situated? Can you show us on this map?

A. Yes, sir. The reef runs across in [281] here some place, some place right in here, between No. 6 and No. 5. Some place in there (pointing).

Mr. HENGSTLER.—Q. On the port side?

A. Yes, sir, on the port side.

Q. In coming down? A. Yes, sir.

Mr. COOPER.—Q. Is not this place indicated by my pencil at or about the spot where you took the barge on a prior trip?

A. This is Horseshoe Bend, from what I understand, from here to here. This barge was loaded in what I understand was Horseshoe Bend, in here some place (pointing).

Q. In the same bend, on the prior trip?

A. On the trip before.

Q. In the same bend you loaded this barge?

A. The dredger loaded her.

Q. But you towed her from that same bend on the prior trip or trips?

A. Yes, sir; from what I understand, that is all the same bend.

Q. Let me ask you this, Captain: Is not this at or about the spot indicated by my pencil which we will mark if you identify it, where you took her before; either her or her sister barge, the reach? Instead of B cross, was it not here (pointing)? Are you not mistaken in making it B cross?

(Deposition of J. P. Lattimore.)

A. It was in that bend some place.

Q. May it have been at the point marked D cross?

A. I don't remember.

Mr. HENGSTLER.—Q. You do not think so. You think that B cross is the place?

A. I think so, yes; I think from the way that I look at the chart, as far as I can remember, I think it is where B cross is.

Mr. COOPER.—Q. Suppose you look at it from this side and [282] see if it makes any difference?

A. I cannot remember now, if it was where B cross is or D cross is.

Q. You don't remember whether it was B cross or D cross? A. No, sir.

Q. It was in that neighborhood? A. Yes, sir.

Q. There is no substantial difference in the situation at B cross, D cross and A cross, is there?

Mr. HENGSTLER.—What do you mean by that?

Mr. COOPER.—Q. I mean in the navigability of the water and the width of the creek and the general topography of the situation?

A. To my judgment, I don't think there is any difference.

Mr. HENGSTLER.—The topography speaks for itself. The map can say that much better than this witness. There certainly is a substantial difference between a bend and a stretch. D cross and B cross are stretches, whereas A cross is a bend, and there must be a difference in the nature of things.

Mr. COOPER.—Q. Is not this creek full of bends? It is a meandering stream? A. Yes, sir.

(Deposition of J. P. Lattimore.)

Q. They are all more or less alike, these various bends?

A. Yes, sir, until you get away close up to Napa.

Q. You had passed the Napa point? You had come from there a couple of hours before any trouble arose, hadn't you? A. Came from Napa?

Q. From the upper portion, from the point nearest to Napa? A. Yes, sir.

Q. You remember the stage of the tide when the "Walter Hackett" came up there that morning, to the point of the wreck on that same morning?

A. No, sir, I don't remember. [283]

Q. Did not the "Walter Hackett" go above that point that morning, nearly up to the dredger?

A. That I don't remember.

Q. You have no recollection on that?

A. No, sir.

Mr. HENGSTLER.—Do you admit that the "Walter Hackett" or a tugboat can get up to the place where the dredger lay, right opposite the asylum?

Mr. COOPER.—I have not any idea. You asked him about the "Walter Hackett," so I just asked him that question.

Mr. HENGSTLER.—I offer this map in evidence as "Libelant's Exhibit 1."

(The map is marked "Libelant's Exhibit 1.")

Redirect Examination.

Mr. HENGSTLER.—Q. You say there was one man on the barge the night of the accident, do you?

A. Yes, sir.

(Deposition of J. P. Latimore.)

Q. And that was unusual?

A. There was no man on her before.

Q. Never before when you towed?

A. Not on the American-Hawaiian barges.

Q. Do you know why there was a man on that barge that particular night?

A. I made a kick for a man; I asked for a man.

Q. To whom did you make the kick, to the captain of the dredger? To the man in charge of the dredger or whom?

A. I don't remember now just who it was.

Mr. COOPER.—Q. You only asked for one man for the barge? A. That is all.

Q. You considered one man ample?

A. Yes, sir. [284]

[Commissioner's Certificate to Deposition of J. P. Lattimore.]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I, James P. Brown, Esq., a United States Commissioner for the Northern District of California, do hereby certify that the reason stated for taking the foregoing deposition is that the testimony of the witness John P. Lattimore is material and necessary in the cause in the caption of the said deposition named and that he is bound on a voyage to sea and will be more than one hundred miles from the place of trial at the time of trial.

I further certify that on Wednesday, March 30th, 1910, at 2 o'clock P. M., I was attended by L. T. Hengstler, Esq., Proctor for the Libelant, Edwin T. Cooper, Esq., and Sheldon C. Kellogg, Esq., Proctors for the Respondent Bennett & Goodall, and Theodore A. Bell, Esq., Proctor for the Respondents Napa Gravel and Material Company and American Bonding Company of Baltimore, and by the witness who was of sound mind and lawful age, and that the witness was by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in said cause; that said deposition was, pursuant to the stipulation of the Proctors for the respective parties hereto, taken in shorthand by Clement Bennett, and afterwards reduced to type-writing; that the reading over and signing of said deposition of the witness was by the aforesaid stipulation expressly waived.

Accompanying said deposition and forming a part thereof is Libelant's Exhibit 1, referred to and specified therein.

I further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my [285] own hand to the United States District Court for the Northern District of California, the Court for which the same was taken.

And I further certify that I am not of counsel nor attorney for any of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In witness whereof, I have hereunto subscribed my

hand at my office in the City and County of San Francisco, State of California, this 1st day of April, 1910.

[Seal]

JAS. P. BROWN,

U. S. Commissioner, Northern District of California,
at San Francisco.

[Endorsed]: Filed Apr. 1, 1910. Jas. P. Brown,
Clerk. By Francis Krull, Deputy Clerk. [286]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 3d day of February, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable R. S. BEAN, Judge.

No. 13,686.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY

vs.

BENNETT & GOODALL et al.

Order Dismissing Libel.

This cause having been heretofore submitted to the Court for decision, *how* after due consideration had thereon, now here by the Court ordered that the libel filed herein be, and the same is hereby dismissed.

[287]

*In the District Court of the United States, in and
for the Northern District of California, Division
No. 1.*

Hon. R. S. BEAN, Judge.

AMERICAN-HAWAIIAN STEAMSHIP COM-
PANY,

Libelant,

vs.

BENNETT & GOODALL, NAPA GRAVEL &
MATERIAL COMPANY, etc.,

Respondents.

Oral Opinion.

Saturday, February 3d, 1912.

The COURT.—(Orally.) The case of the American-Hawaiian Steamship Company vs. Bennett & Goodall was submitted some days ago on its merits.

It is an action to recover the value of a lighter owned by the libelant, and lost while being towed by a tug employed by the respondents, the Napa Gravel & Material Company on the upper reaches of Napa Creek. The lighter was chartered from the libelant by the respondents, Bennett & Goodall, and by them sub-chartered to the Napa Gravel & Material Company. The Napa Gravel & Material Company thereafter hired a gasoline launch of one, Crowley, to tow this barge up and down the stream, and while in charge of this towboat the lighter went [288] ashore, and was wrecked.

It is claimed by the libelant that under the terms of the charter-party the respondents are liable for

the loss unless they have shown by a preponderance of evidence that it was not due to the fault or negligence of their agents, servants, or employees, while the respondents' position is that they are exempted from liability for any loss covered by the policy of insurance on the property in favor of the libelant.

At the time the lighter was chartered by respondents, and at the time of the loss, the libelant had insurance thereon to its full value covering "the adventures and perils of the sea * * * barratry of the master and mariners, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of said vessel, or any part thereof."

The charter-party for this lighter, and another, is to be found in a letter written by the libelant to the respondent, Bennett & Goodall on March 15th, 1907. This letter contains a statement that the respondents were to return the lighter "in as good order and condition as when you get them, reasonable wear and tear and happenings covered by their present policies of insurance excepted, and that if they are lost through any cause that will permit our underwriters to make a successful defense against paying the face of the policies you are to be responsible."

Without discussing the question at length, or referring to the authorities at all it seems to me clear in view of [289] these provisions in the contract, that it was the intention of the parties to exempt the charterers from liability for any loss caused by a happening covered by the policy of insurance, or, in other words, that they should be liable only for a loss

through some cause due to their fault which would prevent the owner from recovering from the insurance company. There is no evidence that the loss of the lighter was due to the fraud or design of the respondents or their agents, or employees. Mere negligence of those in charge thereof, would not defeat a recovery on an insurance policy like the one in question.

If, therefore, it is conceded that the respondents have not shown by a preponderance of its evidence that the loss was not due to the fault it nevertheless was a peril covered by the insurance and exempted from the contract. So, it is unnecessary for the Court to determine in that view of the law whether there was negligence or not, because if there was negligence of any kind it was simply ordinary negligence, and was not such as to exempt the insurance company from liability under their policy.

The libellant relied at the hearing very largely on the case of *Price vs. Union Lighterage Company*, reported in the King's Bench Decisions of 1903, but that was an action against a carrier for a loss on goods while in transit. There was no written contract of carriage, but the goods were shipped under a tariff schedule which stated that the carrier should be exempted from liability "for loss or damage which can be covered by insurance." [290]

The Court held that while under the British law it was competent for a carrier to exempt itself from liability for its own negligence, it must do so by apt and explicit words, and where a contract of carriage was susceptible of two constructions, one of which

exempts the carrier from liability for negligence, and the other will not, the Court will adopt that construction most favorable to the shipper; therefore, the Court said it did not feel authorized to hold that a stipulation, or statement, in a tariff schedule that the carrier should be exempt from liability for loss or damage which can be covered by insurance amounted to an express agreement to relieve it from liability for its own negligence.

Here, however, we have a very different case. It is a proceeding by an owner against the charterer to recover for the loss of a vessel. It is not a proceeding between the shipper and carrier, and we have in addition a written contract between the parties expressing the terms of their agreement. The only question is the proper construction of this contract, and in the Court's view it plainly exempts the respondents from liability for a loss which was covered by these policies of insurance.

In this view of the law the libel will be dismissed.

[Endorsed]: Filed Feb. 5, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [291]

**[Order Dismissing Petition Impleading Napa
Gravel & Material Co. and American Bonding
Co.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 5th day of February, in the year of our Lord

350 *American-Hawaiian Steamship Company*

one thousand nine hundred and twelve. Present: The Honorable R. S. BEAN, Judge.

No. 13,686.

AMERICAN-HAWAIIAN STEAMSHIP CO.

vs.

BENNETT & GOODALL et al.

On motion of Albert Raymond, Esqr., and in accordance with findings herein, by the Court ordered that the petition impleading the Napa Gravel & Material Company and the American Bonding Company of Baltimore be, and the same is hereby, dismissed.

[292]

In the United States District Court, in and for the Northern District of California, First Division.

No. 13,686.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,

Libelant,

vs.

BENNETT & GOODALL, NAPA GRAVEL & MATERIAL COMPANY, and AMERICAN BONDING COMPANY OF BALTIMORE,

Respondents.

Final Decree.

The above cause having been heard on the pleadings and proofs herein, and having been argued and submitted by the proctors for the respective parties, and due deliberation having been had, and it appearing to the Court, and the Court finding, that the libelant and Bennett & Goodall did enter into that

certain agreement more particularly described in article III of the Answer and Exception to Libel of the said Bennett & Goodall; that the respondent, Bennett & Goodall, took possession of and at all times, save as hereinafter set forth, held the lighter described in the libel herein under the said contract or agreement referred to in said article III of said Answer and Exception to Libel; that at the time of the loss of the lighter hereinafter described she had been rechartered with the consent of the libelant to respondent Napa Gravel & Material Company, which held her at said time; that respondent Bennett & Goodall did perform all the things by it agreed to be performed in the said contract or agreement set forth in article III of said Answer and Exception to Libel; that libelant, prior to and at all times during the continuance of the said [293] contract did have a certain policy of insurance issued to it by the Sea Insurance Company, Limited, of Liverpool, which said policy did at all said times insure the said libelant against all happenings to the said lighter by reason of perils of the sea and barratry; that pending the said agreement and charter-party mentioned in article III of said Answer and Exception to Libel, the said lighter was lost through a cause that would not permit and did not permit the said Sea Insurance Company to make a successful defense against the payment of the said policy, the said cause being a happening to the said lighter, to wit, a peril of the sea, to wit, the wrecking of the said vessel by striking upon the bank of Napa Creek, whereby she was caused to collapse and be utterly destroyed; that said lighter was not lost by reason of any wilful miscon-

duct or neglect or wilful act of any kind by the libelant or any of the respondents;

IT IS ORDERED, ADJUDGED AND DECREED BY THE COURT that the Libel filed in this said cause by said libelant, American-Hawaiian Steamship Company, be dismissed with costs, to be taxed against said libelant by all respondents, and it is further ordered that unless an appeal be taken from this Decree within the time limited by law and prescribed by the rules of this Court, the respondents' stipulations and undertakings, and all thereof, be cancelled and discharged.

AND IT IS FURTHER ORDERED that the Petition or Libel filed herein by Bennett & Goodall against the Napa Gravel & Material Company and the American Bonding Company of Baltimore be dismissed pursuant to said dismissal of said original Libel.

Dated April 8th, A. D. 1912.

R. S. BEAN,
Judge. [294]

[Endorsed]: Filed Apr. 8, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [295]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

IN ADMIRALTY.

AMERICAN-HAWAIIAN STEAMSHIP CO.,
Libelant,

vs.

BENNETT & GOODALL, NAPA GRAVEL &

MATERIAL COMPANY, and AMERICAN
BONDING COMPANY OF BALTIMORE,
Respondents.

Cost Bill of Respondent Bennett & Goodall.

Deposited with Clerk of above-entitled court (Clk. & Commr.)	\$ 19.55
Paid U. S. Official Reporter, per diem and copy of testimony for use of Court.....	85.10
Paid U. S. Marshal.....	
Paid U. S. Commissioner.....	
Proctor's Docket Fee.....	20.00
Proctor's Docket Fee deposition of J. P. Lat- temore.....	2.50
Verification Answer.....	.50
Verification Petition Impleading Napa Gravel, etc.....	.50
Witness fees as follows:	
Thomas Crowley, 3 days at \$3.00 per day.....	
William J. Fisher, 3 days at \$3.00 per day.....	
Christian Johansen, 3 days at \$3.00 per day.....	
E. S. Pigott, 3 days at \$3.00 per day.....	\$36.00
	24.00

Costs Taxed at.....\$152.15

JAS. P. BROWN,
Clerk. [296]

William B. Acton, being first duly sworn, deposes and says that he is a clerk in the offices of William Denman, one of the proctors for Bennett & Goodall, respondents herein, and that he is better informed as to such costs than said respondent. That said costs have been necessarily incurred in said action and to the best of affiant's knowledge and belief, said items are correct.

WILLIAM B. ACTON.

Subscribed and sworn to before me this 11th day of April, 1912.

FRANCIS KRULL,
Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Apr. 1, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [297]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY.

AMERICAN-HAWAIIAN STEAMSHIP CO.,
Libelant,

vs.

BENNETT & GOODALL, NAPA GRAVEL &
MATERIAL COMPANY, and AMERICAN
BONDING COMPANY OF BALTIMORE,
Respondents.

Cost Bill of American Bonding Co.

**COST BILL OF RESPONDENT AMERICAN
BONDING COMPANY OF BALTIMORE.**

Proctor's Docket Fee.....	\$20.00
Proctor's Fee Deposit for Witnesses on Be- half of Libelant.....	2.50
Verification Answer25
Verification this Cost Bill.....	.25
	<hr/>
	\$23.00
Clerk's & Commr. Fees.....	4.60
	<hr/>
	27.60

State of California,

City and County of San Francisco,—ss.

Albert Raymond, being duly sworn, deposes and says:

That he is one of the Proctors for Respondent American Bonding Company of Baltimore in the above-entitled action, and as such is better informed relative to the above costs and disbursements than is said respondent, that the items in the above memorandum contained are correct to affiant's knowledge and belief, and that the said disbursements have been necessarily incurred in said action. [298]

ALBERT RAYMOND.

Subscribed and sworn to before me, this 11th day of April, 1912.

[Seal]

HUGH T. SIME,

Notary Public, in and for the City and County of San Francisco, State of California.

Receipt of a copy of the within cost bill is admitted this 11th day of April, 1912.

Proctor for Libelant.

[Endorsed]: Filed Apr. 11, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [299]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY.

AMERICAN-HAWAIIAN STEAMSHIP CO.,
Libelant,

vs.

BENNETT & GOODALL, NAPA GRAVEL &
MATERIAL COMPANY, and AMERICAN
BONDING COMPANY OF BALTIMORE,
Respondents.

Notice of Taxation of Costs.

To the Libelant Above Named and to Messrs. Andros & Hengstler, Its Proctors, to Napa Gravel and Material Company and to Theodore A. Bell, Its Proctor; to American Bonding Company of Baltimore, and to Messrs. Lilienthal, McKinstry & Raymond, Its Proctors;

YOU, and each of you, will please take notice that on Thursday, April 18, 1912, at the hour of 10 o'clock A. M. of said day, or as soon thereafter as counsel may be heard, that respondents above named, Bennett & Goodall, will move the Clerk of the above-en-

titled court to tax all the costs in the above-entitled action.

EDWIN T. COOPER and
DENMAN & ARNOLD,

Proctors for Respondents, Bennett & Goodall.

Receipt of a copy of the within Notice of Taxation of Costs are hereby admitted this 13th day of April, 1912.

ANDROS & HENGSTLER,
Proctors for Libelant.
THEODORE A. BELL,
Proctor for Napa Gravel, etc.

[Endorsed]: Filed Apr. 12, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [300]

*In the United States District Court, Northern
District of California, First Division.*

AMERICAN-HAWAIIAN S. S. CO.,
Plaintiff,
vs.
BENNETT AND GOODALL, etc., et al.,
Defendants.

Memorandum of Costs and Disbursements.

DISBURSEMENTS.

Sheriff's fees.....	\$	
		4.50
Clerk's fees.....	\$	10.00
Witness.....	\$	
Proctor's fees.....	\$	20.00
Proctor's fees taking deposition.....	\$	2.50
Verification of Answer.....	\$.50
Verification for Cost Bill.....	\$.25
		<hr/>
		\$27.75

State of California,

City and County of San Francisco,—ss.

Theodore A. Bell, being duly sworn, says: That he is one of the respondents in the above-entitled action, and as such is better informed relative to the above costs and disbursements than the said Napa Gravel & Material Co. That the items in the above memorandum contained are correct, to the best of this affiant's knowledge and belief, and that the said disbursements have been necessarily incurred in said action. [301]

THEODORE A. BELL.

Subscribed and sworn to before me, this 12th day of April, A. D. 1912.

[Seal]

W. W. HEALEY,

Notary Public in and for the City and County of San Francisco, State of California, 208 Crocker Building.

[Endorsed]: Filed Apr. 12, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [302]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

IN ADMIRALTY.

AMERICAN-HAWAIIAN STEAMSHIP COM-
PANY,

Libellant,

vs.

BENNETT & GOODALL, NAPA GRAVEL &
MATERIAL COMPANY, and AMERICAN
BONDING COMPANY OF BALTIMORE,
Respondents.

**Brief of Respondents, Bennett & Goodall, on
Taxation of Costs.**

Respondents, Bennett & Goodall, are not concerned in this appeal. The only party entitled to obtain a ruling on the appeal that the costs should be taxed against Bennett & Goodall, is the Napa Gravel & Material Company. The Napa Gravel & Material Company has not appealed, and is therefore not entitled to any relief on the appeal, whatever the Court's ruling may be as to the assessment of their costs against the libellant.

It appears further that the clerk is supported by authority. In the case of the Maurice, reported in 130 Fed. 634, a case like that at bar, the District Court for the Eastern District of Pennsylvania held that it was entirely proper to have the libellant pay

all costs. At page 635 the Court states as follows:

“The costs in admiralty cases are entirely under the control of the Court, and it is evident that no system of rules can be laid down in a matter so purely in the discretion of the Court. . . . Where a libel is filed and the respondent is compelled to defend, he is entitled to avail himself of every defense the law allows him, and whatever costs may [303] be incurred in his attempt to exonerate himself from damage, when he is successful, and the circumstances of the case show that he is entirely faultless, are chargeable to the party putting him to that expense; and it seems to the Court entirely legitimate to include all costs, whether it be for the purpose of establishing his own faultlessness or in showing that a third party, under Rule 59, was to blame.”

As far as we can find, there has been no ruling on this point in this District. The rule in New York is as claimed, but that is no more binding on this Court than is the rule from Pennsylvania, and if the Court is to adopt that rule which best conforms to the demands of justice, then we contend that the rule laid down above is the rule to be adopted. Here we were wrongfully sued. Being entitled to every available defense, we brought in these other respondents, so that the liability, if any, might be settled in one action. The Court having determined that there was no liability on our part, and consequently none on the part of the other respondents, dismissed libellant's libel. But for the wrongful libeling of the respond-

ents, Bennett & Goodall, we would not have impleaded the Napa Gravel & Material Company or the American Bonding Company of Baltimore. And by reason of that wrong of libelants, we respectfully submit that the exceptions to the taxation be overruled and that the taxation in all respects be sustained.

If the exceptions to the taxation be sustained, it is submitted that the most the Court can do is to order that the costs of the Napa Gravel & Material Company be not assessed against the libelant and that no relief in favor of the Napa Gravel & Material Company and against Bennett & Goodall can be granted in the [304] absence of an appeal by the Napa Gravel & Material Company.

Respectfully submitted,

EDWIN T. COOPER,

DENMAN & ARNOLD,

Proctors for Bennett & Goodall.

Receipt of a copy of the within Brief of Bennett & Goodall on the taxation of costs herein is hereby admitted this 20th day of April, 1912.

ANDROS & HENGSTLER,

Proctors for Libelant.

THEODORE A. BELL,

Proctors for Napa Gravel & Material Company.

[Endorsed]: Filed Apr. 20, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [305]

**[Memorandum Opinion Affirming Clerk's Taxation
of Costs.]**

*In the District Court of the United States for the
Northern District of California, First Division.*

No. 13,686.

AMERICAN-HAWAIIAN STEAMSHIP COM-
PANY,

Libelant,

vs.

BENNETT & GOODALL, NAPA GRAVEL &
MATERIAL COMPANY, and AMERICAN
BONDING COMPANY OF BALTIMORE,
Respondents.

DE HAVEN, District Judge.

The Clerk in taxing costs followed the directions
contained in the Decree, and his action is therefore
affirmed.

[Endorsed]: Filed Apr. 25, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [306]

*In the District Court of the United States in and
for the Northern District of California.*

No. 13,686.

AMERICAN-HAWAIIAN STEAMSHIP CO.,
Libelant,

vs.

BENNETT & GOODALL et als.,
Respondents.

Notice of Appeal.

To Bennett & Goodall, a Corporation, Napa Gravel & Material Company, a Corporation, and American Bonding Company, a Corporation, Respondents Herein, and to Messrs. William Denman, Edwin T. Cooper, Sheldon G. Kellogg, Theodore A. Bell, Jesse W. Lilienthal, and Albert Raymond, Proctors for Respective Respondents:

You, and each of you, will please take notice that the libelant herein hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of the District Court of the United States for the Northern District of California, entered in said cause on the 8th day of April, 1912.

Dated August 28th, 1912.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,

Proctors for Appellant.

Due service and receipt of a copy of the within Notice of Appeal is hereby admitted this 28th day of August, 1912.

E. T. COOPER,
SHELDON G. KELLOGG,
DENMAN and ARNOLD,

Proctors for Respondent, Bennett & Goodall.

[307]

THEODORE A. BELL,
Proctor for Napa Gravel & Material Co.

JESSE W. LILIENTHAL,
ALBERT RAYMOND,

Proctors for American Bonding Company.

[Endorsed]: Filed Aug. 28, 1912. Jas. P. Brown,
Clerk. By Francis Krull, Deputy Clerk. [308]

*In the District Court of the United States in and
for the Northern District of California.*

No. 13,686.

AMERICAN-HAWAIIAN STEAMSHIP CO., a
Corporation,

Libelant,

vs.

BENNETT & GOODALL, a Corporation,

Respondent.

Assignment of Errors [on Appeal].

Comes now American-Hawaiian Steamship Co., libelant herein, and assigns as error in the findings and decree of the Court the following:

1. The Court erred in finding and deciding that respondent Bennett & Goodall did perform all the things by it agreed to be performed in the agreement set forth in Article III of its answer and exception to libel.

2. The Court erred in finding and deciding that the said lighter was lost through a cause that would not permit and did not permit the Sea Insurance Company to make a successful defense against the payment of its policy.

3. The Court erred in finding and deciding that the cause of the loss of the lighter was a peril of the sea.

4. The Court erred in deciding that the wrecking

of the vessel by striking upon the bank of Napa Creek was a peril of the sea.

5. The Court erred in not finding and deciding that the cause of the loss of the vessel was such negligence on the part of respondents as made them liable to libellant under the contract. [309]

6. The Court erred in finding and deciding that the lighter was not lost by any willful misconduct or neglect, or willful act of any kind, by any of the respondents.

7. The Court erred in deciding that, assuming negligence on the part of respondent in using the lighter, the respondent is nevertheless, under its contract, exempt from liability therefor.

8. The Court erred in not deciding that the loss of said lighter was caused by happenings for which respondent Bennett & Goodall was responsible to libellant.

9. The Court erred in dismissing the libel.

10. The Court erred in not entering a decree in favor of the libellant, and against respondent Bennett & Goodall, for the damages suffered by libellant by reason of the loss of said lighter.

11. The Court erred in decreeing costs of suit to be taxed against libellant by all or any of the respondents.

12. The Court erred in taxing any costs of suit and in particular proctor's fees, against libellant in favor of Napa Gravel & Material Co., and American Bonding Company.

ANDROS & HENGSTLER,

Proctors for Libellant.

Dated San Francisco, September 14, 1912.

[Endorsed]: Filed Sep. 14, 1912. Jas. P. Brown,
Clerk. By Francis Krull, Deputy Clerk. [310]

*In the United States District Court, in and for the
Northern District of California, First Division.*

No. 13,686.

AMERICAN-HAWAIIAN STEAMSHIP COM-
PANY,

Libelant,

vs.

BENNETT & GOODALL, NAPA GRAVEL &
MATERIAL COMPANY, and AMERICAN
BONDING COMPANY OF BALTIMORE,
Respondents.

Notice of Cross-Appeal of Bennett & Goodall.

To the American-Hawaiian Steamship Company, a Corporation, Libelant Herein, and Napa Gravel & Material Company, a Corporation, and American Bonding Company of Baltimore, a Corporation, Respondents Herein, and to Messrs. Louis F. Hengstler, Andros & Hengstler, Theodore A. Bell, Jesse W. Lilienthal, and Albert Raymond, Proctors for Respective Libelant and Respondents:

You, and each of you, will please take notice that the respondent above named, Bennett & Goodall, a corporation, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of the District Court of the United States for the Northern District of California, en-

tered in the above cause on the 8th day of April, 1912, and desires to review only the question of the right of the Court to make that portion of the decree in which it is ordered that the petition or libel filed in the above cause by Bennett & Goodall against the Napa Gravel & Material Company and the American Bonding Company of Baltimore be dismissed, pursuant to the dismissal of the original [311] libel.

Dated September 14, 1912.

EDWIN T. COOPER,
G. S. ARNOLD,
WILLIAM DENMAN,
DENMAN & ARNOLD,
Proctors for Appellant.

Receipt of a copy of the within Notice of Cross-Appeal of Bennett & Goodall is hereby admitted this 16th day of September, 1912.

ANDROS & HENGSTLER,
Proctors for Libelant.

THEODORE A. BELL,
Proctors for Napa Gravel, etc.
JESSE W. LILIENTHAL,
ALBERT RAYMOND,

Proctors for American Bonding Co.

[Endorsed]: Filed Sep. 16, 1912. Jas. P. Brown,
Clerk. By C. W. Galbreath, Deputy Clerk. [312]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 13,686.

AMERICAN-HAWAIIAN STEAMSHIP CO., a
Corporation,

Libelant,

vs.

BENNETT & GOODALL, a Corporation,
Respondent.

**Stipulation [and Order Concerning Original
Exhibits].**

IT IS HEREBY STIPULATED between the proctors for the respective parties that all the exhibits introduced in evidence at the hearing of the above-entitled cause may be omitted from the Apos-tles on Appeal in said cause and may be filed in the United States Circuit Court of Appeals for the Ninth Circuit in the original form in which the same were introduced at the hearing of said cause.

Dated September 14, 1912.

ANDROS & HENGSTLER,
Proctors for Appellant.
DENMAN and ARNOLD,
Proctors for Respondent.

Approved and so ordered.

JOHN J. DE HAVEN,
District Judge.

[Endorsed]: Filed Sep. 16, 1912. Jas. P. Brown,
Clerk. By Francis Krull, Deputy Clerk. [313]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

IN ADMIRALTY.

AMERICAN-HAWAIIAN STEAMSHIP CO., a
Corporation,

Libelant,

vs.

BENNETT & GOODALL, a Corporation, NAPA
GRAVEL AND MATERIAL COMPANY, a
Corporation, and AMERICAN BONDING
COMPANY OF BALTIMORE, a Corpora-
tion,

Respondents.

Assignment of Errors [on Cross-Appeal].

Comes now Bennett & Goodall, respondent and
cross-appellant herein, and assigns as error in the
findings and decree of the Court the following:

I.

That the Court erred in dismissing the petition or
libel filed by Bennett & Goodall against the Napa
Gravel & Material Company and against the Ameri-
can Bonding Company of Baltimore.

II.

The Court erred in not finding that if the loss of
the lighter set out in the decree had been caused by
reason of any wilful misconduct or neglect or other
act for which any respondent was liable in damages
to the libelant, American-Hawaiian Steamship Com-
pany, the respondents Napa Gravel & Material Com-

pany and American Bonding Company of Baltimore, or either of them, and not Bennett & Goodall, were so liable.

III.

The Court erred in not finding that it was a necessary and an absolute condition precedent to the institution and maintenance of this action, that said libelant should first [314] seek and endeavor to collect by appropriate action in a Court of competent jurisdiction, the said insurance policy or policies, and to recompense itself fully for the loss of said lighter, and therefore that this action was premature.

EDWIN T. COOPER,
G. S. ARNOLD,
WILLIAM DENMAN,
DENMAN & ARNOLD,

Proctors for Respondent Bennett and Goodall.

Due service and receipt of a copy of the within Assignment of Errors is hereby admitted this 2d day of October, 1912.

ANDROS & HENGSTLER,
Proctors for Libelant.

THEODORE A. BELL,
Proctor for Respondent, Napa Gravel, etc.
LILIENTHAL, McKINSTRY & RAY-
MOND,

Proctors for Respondent American Bonding Company.

[Endorsed]: Filed Oct. 3, 1912. Jas. P. Brown, Clerk. By C. W. Galbreath, Deputy Clerk. [315]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

IN ADMIRALTY.

AMERICAN-HAWAIIAN STEAMSHIP CO., a
Corporation,

Libelant,

vs.

BENNETT & GOODALL, a Corporation, NAPA
GRAVEL AND MATERIAL COMPANY, a
Corporation, and AMERICAN BONDING
COMPANY OF BALTIMORE, a Corpora-
tion,

Respondents.

**Stipulation [That Record on Appeal may Constitute
Record on Cross-Appeal, etc.].**

It is hereby stipulated and agreed by and between the parties hereto that the Apostles on Appeal, now being prepared at the request of the proctors for libelant herein, may constitute and be considered as the Apostles on Appeal of respondent, Bennett & Goodall, on their cross-appeal herein, with the exception of the Notice of Appeal of said respondent, Bennett & Goodall, and its Assignments of Error, the order making Napa Gravel & Material Company, and American Bonding Company of Baltimore, respondents, the petition for the above order, the exceptions to said petition filed by Napa Gravel & Material

Company, and the exceptions to said petition filed by American Bonding Company of Baltimore.

Dated September 30, 1912.

ANDROS & HENGSTLER,
Proctors for Libelant.

EDWIN T. COOPER,
DENMAN and ARNOLD,

Proctors for Bennett and Goodall. [316]

THEODORE A. BELL,
Proctor for Napa Gravel & Material Company.

LILIENTHAL, McKINSTRY & RAY-
MOND,

Proctors for American Bonding Company of Balti-
more.

[Endorsed]: Filed Oct. 3, 1912. Jas. P. Brown,
Clerk. By C. W. Galbreath, Deputy Clerk. [317]

**Certificate of Clerk U. S. District Court to Apostles,
etc.**

United States of America,
Northern District of California,—ss.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, hereby certify the foregoing and hereunto *annexed numbered* from 1 to 317, inclusive, with the accompanying exhibits, two in number (transmitted under separate cover), contain a full, true and correct Transcript of the records, as the same now appear on file and of record in the said District Court, in the cause of the American-Hawaiian Steamship Company, a Corporation, vs. Bennett & Goodall, a

Corporation, et al., etc., numbered 13,686. Said Transcript having been made up pursuant to the "Praecipies" embodied in said Transcript and the instructions of the proctors for appellants and cross-appellants herein.

I further certify that the costs of preparing and certifying to the foregoing Transcript of Appeal in the sum of One Hundred and Forty-nine (149) Dollars, to wit, appellants American-Hawaiian Steamship Company, \$136.90, and cross-appellants Bennett & Goodall (a corporation), \$12.10, and that the same has been paid to me by the proctors for appellants and cross-appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 28th day of December, A. D. 1912.

[Seal]

W. B. MALING,

Clerk.

By Lyle S. Morris,
Deputy Clerk. [318]

[Endorsed]: No. 2230. United States Circuit Court of Appeals for the Ninth Circuit. American-Hawaiian Steamship Company, a Corporation, Appellant, vs. Bennett & Goodall, a Corporation, Napa Gravel and Material Company, a Corporation, and American Bonding Company of Baltimore, a Corporation, Appellees, and Bennett & Goodall, a Corporation, Cross-appellant, vs. American-Hawaiian Steamship Company, a Corporation, and Napa Gravel and Material Company, a Corporation, and

American Bonding Company of Baltimore, a Corporation, Cross-appellees. Apostles. Upon Appeal and Cross-appeal from the United States District Court for the Northern District of California, First Division.

Filed December 28, 1912.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

Certificate of Clerk U. S. District Court to Original Exhibits.

United States of America,
Northern District of California,—ss.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the annexed Documents, two in number, known as and marked “Rspdts. Exhibit ‘A’ ” (Obligation—Napa Gravel and Material Company), and “Rspdts. Exhibit ‘B’ ” (Articles of Agreement), are original exhibits introduced and filed in the cause of the American-Hawaiian Steamship Company (a Corporation) vs. Bennett and Goodall (a Corporation), etc., No. 13,686, and are herewith transmitted to the Circuit Court of Appeal for the Ninth Circuit, as per Stipulation and Order filed in this Court and copy thereof embodied in the Apostles on Appeal, herewith.

IN WITNESS WHEREOF, I have hereunto set

my hand and official seal of said District Court, this 28th day of December, A. D. 1912.

[Seal]

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk.

[Respondent's Exhibit "A."]

KNOW ALL MEN BY THESE PRESENTS, That we, NAPA GRAVEL AND MATERIAL COMPANY, a corporation organized and existing under the laws of the State of California, as principal, and AMERICAN BONDING COMPANY OF BALTIMORE, a corporation organized and existing under the laws of the State of Maryland, and duly authorized and licensed to transact a general surety business in the State of California, as surety, are held and firmly bound unto BENNETT & GOODALL, a corporation, in the sum of Fifteen Thousand Dollars (\$15,000.00) gold coin of the United States of America, to be paid to said BENNETT & GOODALL, its successors or assigns, for which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That whereas, on the 25th day of March, A. D. 1907, certain ARTICLES OF AGREEMENT were made and entered into between BENNETT and GOODALL and NAPA GRAVEL AND MATERIAL COMPANY whereby the said NAPA GRAVEL AND MATERIAL COMPANY

has chartered from said BENNETT & GOODALL two (2) certain barges known and designated by the numbers 1 and 2 and owned by the AMERICAN-HAWAIIAN STEAMSHIP COMPANY, which said agreement is hereby referred to and made a part of this bond;

NOW, THEREFORE, if the said NAPA GRAVEL AND MATERIAL COMPANY shall faithfully perform all the obligations of the aforesaid agreement then this obligation shall be null and void; otherwise to remain in full force and virtue for the period of one year from this date.

PROVIDED HOWEVER, That the surety shall not in any event be liable for the payment of any damage or loss coverable by policies of insurance insuring said barges against damage or loss by accident or fire.

IN TESTIMONY WHEREOF the said NAPA GRAVEL AND MATERIAL COMPANY has affixed its seal and caused its name to be subscribed by its Secretary, THEODORE A. BELL, this 28th day of March, A. D. 1907, and said surety has caused this instrument to be executed by its Agent and Attorney-in-Fact at San Francisco, California, this 28th day of March, A. D. 1907.

NAPA GRAVEL AND MATERIAL COMPANY,

By THEODORE A. BELL,

Secretary,

AMERICAN BONDING COMPANY OF
BALTIMORE,

[Seal]

By JOY LICHTENSTEIN,

Agent and Attorney-in-fact.

[Endorsed]: Rspdts. Ex. "A." F. K. In Favor of ———. No. 13,686. Am. Hawaiian S. S. Co. vs. Bennett & Goodall et al. Rspdts. Exhibit "A." Jan. 11-12. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

Case No. 2230. U. S. Circuit Court of Appeals for the Ninth Circuit. Respondent's Exhibit "A." Received Dec. 28, 1912. F. D. Monckton, Clerk.

[Respondent's Exhibit "B."]

THESE ARTICLES OF AGREEMENT, made and entered into this 25th day of March, A. D. 1907, at San Francisco, California, between BENNETT & GOODALL, a corporation organized under the laws of the State of California, with its principal place of business at San Francisco, hereinafter called first party, and NAPA GRAVEL & MATERIAL COMPANY a corporation organized under the laws of said State, with its principal place of business at Napa, in said State, hereinafter called second party, WITNESSETH:

That said first party has this day chartered and let unto said second party and said second party has this day hired and taken from said first party those two certain barges, known and designated by the Numbers 1 and 2, and owned by the American-Hawaiian Steamship Company and chartered by said owner to said first party with power to subcharter the same, upon the following express terms, payments and conditions, viz.:

1st. The entire barges are hereby let and surrendered to said second party who shall have exclusive control thereof and shall solely bear all expenses

of equipping, manning and operating the same, and also all wharfage therefor.

2nd. Said barges are rented and chartered hereby from month to month only and expressly subject to thirty days' written notice of cancellation of charter given by either party to the other, and also subject to the right of first party and of the owner of said barges as specified in the next succeeding paragraph.

3rd. In the event that the owner of said barges desires them or either of them for use in its or their own business at any time or times, they shall be returned and surrendered by second party upon seven days' written notice to that effect, but shall be again delivered to second party immediately upon being released by said owner, and such demands of said owner and consequent interruptions of the use of either or both said barges by said second party shall not avoid or affect these Articles or release second party therefrom, excepting only that second party shall not be compelled to pay said hire and compensation herein specified during the time that second party shall be actually deprived of the use of said barges pursuant to this paragraph; said payments and compensation to recommence immediately in each case upon the redelivery of said barges to second party. The taking by the owner of one barge hereunder shall not affect these Articles or release second party from the payment of the rental herein named for the remaining barge which it shall continue to use at the rate named hereinbelow.

4th. Rate and compensation to be paid by second party to first party shall be and is fixed at \$30

per day for each barge, payable at the place, time and in the manner following, that is to say:

Ten days' charter money at the rate of \$30 per day for each barge to be paid in advance every ten days during the first month, the first payment for the first ten days to be made upon the signing of these presents; and on and after the first month from the date hereof, and commencing 30 days from the date hereof, payments shall be made every fifteen days in advance for the 15 days next succeeding. All payments hereunder to be made in United States Gold Coin and at the office of first party in said City of San Francisco.

5th. Second party shall be fully responsible for and shall pay on demand any and all damage and deterioration to said barges and to each and both of them not directly due to ordinary wear and tear or not included in and covered by the insurance policies now or hereafter in existence insuring the said barges.

6th. Second party may erect side boards, but no stanchions or braces, for the same shall be run through the decks of said barges or of either of them.

7th. Upon termination hereof or upon call for said barges as herein provided for second party shall surrender the same and both thereof entirely free and clear and exempt from and of all incumbrances, libels, liens, attachments and claims of every kind and description, whether for wages, services, repairs, supplies, materials or necessities or otherwise, and absolutely exempt from any and

all demands affecting said barges or either of them or first party or the owner thereof, made or suffered by said second party, its agents, employees, or others acting or claiming to act by, for or under it.

8th. Second party agrees upon the signing hereof and as part of this transaction to secure and cause to be delivered a surety bond satisfactory to first party, in due and legal form, and in the sum or amount of \$15,000 securing to first party and guaranteeing the full and faithful performance of these Articles of Agreement by second party, and the making of the payments and payment of any and all damages by second party herein provided for or stipulated, or implied hereunder.

IN WITNESS WHEREOF, said first party and said second party have hereunto set their corporate names and caused their corporate seals to be affixed, each by its proper officers thereunto first duly authorized by Resolution, the day and year first hereinabove written.

BENNETT & GOODALL (First Party).

By H. W. GOODALL, Pres.

NAPA GRAVEL AND MATERIAL COMPANY (Second Party).

By GEO. B. POWERS,

General Manager.

THEODORE A. BELL.

Secretary.

[Endorsed]: Respdts. Ex. "B." F. K. No. 13,686. Am.-Hawaiian S. S. Co. vs. Bennett & Goodall et al. Respdts. Exhibit No. "B." Jan. 11, 1912. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

Case No. 2230. U. S. Circuit Court of Appeals
for the Ninth Circuit. Respondent's Exhibit "B."
Received Dec. 28, 1912. F. D. Monckton, Clerk.

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY.

AMERICAN-HAWAIIAN STEAMSHIP CO.,

Libelant,

vs.

BENNETT & GOODALL, a Corporation, NAPA
GRAVEL & MATERIAL COMPANY, a
Corporation, and AMERICAN BONDING
COMPANY OF BALTIMORE, a Corpora-
tion,

Respondents.

**Stipulation [and Order Enlarging Time to October
28, 1912, to Prepare Apostles].**

It is hereby stipulated and agreed by and between
the undersigned that the Clerk of the above-entitled
Court may have 30 days from the 28th day of Sep-
tember, 1912, within which to prepare the Apostles

382 *American-Hawaiian Steamship Company*

on Appeal in the above-entitled cause.

Dated, Oct. 14, 1912.

ANDROS & HENGSTLER,
Proctors for Libelant.

EDWIN T. COOPER,
WILLIAM DENMAN,

DENMAN and ARNOLD,

Proctors for Bennett & Goodall, Respondents herein.

So ordered.

WM. C. VAN FLEET,
Judge.

[Endorsed]: No. ———. In the District Court of the United States, Northern District of California, First Division. In Admiralty. *American-Hawaiian S. S. Co.*, Libelant, vs. *Bennett & Goodall et al.*, Respondents. Stipulation. Filed Oct. 16, 1912. F. D. Monckton, Clerk. Filed Oct. 15, 1912. Jas. P. Brown, Clerk. By C. W. Calbreath, Deputy Clerk.

**[Stipulation and Order Extending Time to
November 27, 1912, to Prepare Apostles.]**

*In the District Court of the United States in and
for the Northern District of California.*

AMERICAN-HAWAIIAN S. S. CO., a Corpora-
tion,

vs.

BENNETT & GOODALL, a Corporation, et al.

It is hereby stipulated and agreed by and between the parties hereto that the Clerk of the above-entitled court may have thirty days from and after

the 28th day of October within which to prepare the apostles on appeal in the above-entitled cause.

ANDROS & HENGSTLER,

Proctors for Libelant.

EDWIN T. COOPER,

DENMAN and ARNOLD,

Proctors for Bennett & Goodall.

So ordered.

WM. W. MORROW,

Judge.

[Endorsed]: Filed Nov. 7, 1912. F. D. Monckton,
Clerk.

**[Order Enlarging Time to December 28, 1912, to
Prepare Apostles.]**

*In the United States District Court, Northern Dis-
trict of California.*

No. 13,686.

AMERICAN-HAWAIIAN STEAMSHIP CO., etc.

vs.

BENNETT and GOODALL, etc.

Good cause appearing therefor, it is hereby ordered that the Clerk of said court have thirty (30) days' further time from and after the 28th day of November, 1912, in which to prepare the Apostles on Appeal in the above-entitled cause.

WM. W. MORROW,

Judge.

[Endorsed]: No. 2230. United States Circuit Court of Appeals for the Ninth Circuit. **Order** Under Rule 16 Enlarging Time to Dec. 28, 1912, to File Record Thereof and to Docket Case. Filed Nov. 29, 1912. F. D. Monckton, Clerk.

[Endorsed]: No. 2230. United States Circuit Court of Appeals for the Ninth Circuit. **Orders** Under Rule 16 Enlarging Time to Dec. 28, 1912, to File Record Thereof and to Docket Case. **Refiled** Dec. 28, 1912. F. D. Monckton, Clerk.

No. 2230

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN-HAWAIIAN STEAMSHIP
CO. (a corporation),

Libelant and Appellant,

VS.

BENNETT & GOODALL (a corporation),
Respondent and Appellant.

BRIEF FOR APPELLANT.

Statement of the Case.

Libelant rented its "*Lighter No. One*", and another lighter, to respondent Bennett & Goodall by an informal agreement, consisting of a letter written by libelant to said respondent, on March 18, 1907, and accepted by said respondent. This letter contains the following statements:

"You are to be responsible for these lighters and whatever gear is on them when you take them, and are to return them in as good order and condition as when you get them, reasonable

wear and tear and happenings covered by their present policies of insurance excepted.

“You are particularly not to permit anything to be loaded on them or unloaded from them, in a manner that will twist or strain them, and if they are lost through any cause that will permit our underwriters to make a successful defence against paying the face of the policies, you are to be responsible.”

The value of the lighter was agreed to be \$7,500.00. It was substantially a huge wooden box, with no motive power, and of a width of thirty-eight feet, a length of one hundred and twenty-one feet, and a depth of nine feet nine inches.

“Lighter No. One” was thereafter sublet by respondent Bennett & Goodall to respondent Napa Gravel & Material Company. The latter used the same for the purpose of hauling gravel down Napa Creek, one of the tributaries of the Bay of San Francisco, the lighter with its load being towed by a gasoline launch. On April 11, 1907, the lighter, while in charge of the gasoline launch, went ashore and became a total loss.

QUESTIONS INVOLVED.

First Question: What is the degree of care imposed upon the respondent by the contract, in using the lighter? (Question of *Judicial Construction* of a contract of hiring.)

Second Question: Did the respondent apply the requisite degree of care in using the lighter? (Question of fact, determined by the evidence.)

Appellant's Position:

1. Respondent is not, by the contract, exempted from liability for its own negligence, or the negligence of its agents, employees or sub-charterers.
2. Respondent did not apply the requisite degree of care in using the lighter, but, on the contrary, was guilty of, at least, ordinary, and, we contend, of gross and wilful negligence.
3. That respondent's negligence was the cause of the destruction of the lighter.

Respondent's position:

Respondent is, *by contract*, exempted from liability for its own negligence, and the negligence of its agents, employees and subcharterers, and had, therefore, a right to use and manage the lighter negligently, as long as its negligence did not reach the degree of wilfulness.

We respectfully submit, at the outset, that this contention on the part of respondent involves the immoral assumption that a party A can make a legal contract with B, the effect of which is, not only that B is permitted to destroy A's property by negligent conduct, but also that the responsibility for the loss is saddled upon a third and innocent party C (the insurer of A's property), who knows nothing of the contract. It is quite apparent that, under the protection of such a contract, B could,

with impunity, cause a serious liability to the stranger C which would not have attached but for the negligence of B. In other words, the insurer C would be legally compelled to pay a heavy loss, because B, encouraged thereto by a "contract" with A, used A's property negligently and thereby destroyed it. The contention of respondent is also in sharp conflict with the presumption that men of business are extremely unlikely to make a contract so one-sided and, indeed, iniquitous, as respondent insists upon.

SPECIFICATION OF ERRORS RELIED UPON.

The errors on which appellant relies in praying this Court for a reversal of the decree of the lower Court, and which are more particularly stated in its "Assignment of Errors", may be classified under the following larger headings:

I. *The Court decided* that, assuming that negligence on the part of respondent resulted in the loss of the lighter, the respondent is, nevertheless, under the contract, exempt from liability therefor (Assignments Nos. 1, 2, 5, 7). This decision involves a *construction of the contract*.

We contend that this construction placed upon the contract is erroneous, and that, under a proper construction thereof, respondent is liable for the consequences of its negligence in using the lighter.

II. *The Court decided* that the cause of the loss of the lighter was a peril of the sea, to-wit, the

striking of the lighter upon the bank of Napa Creek (Assignments Nos. 3, 4); that, therefore, it was such a cause as would not permit the insurance company to make a successful defense against the payment of its policy (Assignment No. 2).

We contend that the legal cause of the loss of the lighter was the misconduct of respondent, amounting to at least negligence, and, indeed, to *wilful negligence*, in the use and management of the lighter; and furthermore, that the striking of the lighter upon the bank of Napa Creek was not a peril of the sea insured under the policy; that the legal cause of the loss was not a peril of the sea at all, but was such a cause as would permit the insurance company to make a successful defense against the payment of its policy.

Argument of Appellant.

I. CONSTRUCTION OF THE CONTRACT.

On this subject we make two points:

A. Assuming that the parties to the contract had intended to make a contract relieving the charterer from liability for the consequences of its negligence, such intended stipulation would be void in law.

B. In fact the contract between the parties was not intended to, nor did it in legal effect relieve the charterer from liability for the consequences of its negligence.

A.

The effect of the charter was to give the charterer entire control of the movements and navigation of the lighter, and to make the charterer owner pro hac vice.

Monk v. Steamboat Co., 198 Fed. 472.

It may be conceded that, *generally*, owner and charterer of a vessel may legally contract that the risk of loss of the vessel through the negligence of those for whose acts the charterer is responsible shall be assumed by the owner (*McCormick v. Shippy*, 119 Fed. 226).

We submit, however, a distinction between the charter or demise of an ordinary vessel propelled by her own motive power, and, on the other hand, the charter or hire, as in the case at bar, of a powerless floating box with no means of self-propulsion, of use to the charterer only when towed from place to place, and which is entirely dependent upon the motive power furnished by the charterer for its navigation. In the nature of things the hire of a lighter of this nature involves, on the part of the hirer, the duties and liabilities connected with the furnishing of adequate towage, and therefore, in the nature of things, the hirer of the lighter assumes, in his contract of hire, the duties and liabilities connected with *safe towage*.

The question has long been settled in the Federal Courts that the tug is not a common carrier of its

tow, and that, therefore, the duties imposed upon the tug in connection with the safety of the tow are less stringent than those which the common carrier owes to the goods carried; but obviously this principle applies to a less extent to the towage of a lighter without power to navigate, and therefore the obligations of the hirer of a helpless lighter should, in the nature of things, be more stringent than those of the charterer of a vessel possessed of full powers of locomotion, and should more closely approximate the obligations and responsibilities of a common carrier. We do not claim that respondent in this case was governed by the duties of a common carrier; but our contention is that, apart from contract, the obligations of respondent, in connection with this lighter, were analogous to and at least of the same degree as the obligations which the law imposes upon the tug under a towage contract; that, therefore, the legal effect of the stipulation at bar, as to relieving respondent from liability for the consequences of its negligence is analogous to the legal effect of a stipulation purporting to exempt the tug from negligence in a *towage contract*.

What is the legal effect of such a stipulation in a towage contract?

“The owner of a vessel undertaking a towage service may contract for a more restricted or more extensive liability than the law imposes upon him. *But a towing vessel cannot relieve itself by contract from liability for failure to*

exercise reasonable care and skill in the performance of the service and for the safety of the tow."

38 Cyc. 581.

This statement of the rule is supported by the Supreme Court in the case of

The Syracuse, 12 Wall. 167,

and a series of cases following this leading case.

In the latter Mr. Justice Davis says:

"It is unnecessary to consider the evidence relating to the *alleged contract of towage*, because, if it be true * * *, that by special agreement the canal boat was being towed at her own risk, *nevertheless the steamer is liable* if, through the negligence of those in charge of her, the canal-boat has suffered loss. Although the policy of the law has not imposed upon the towing-boat the obligation resting upon a common carrier, it does require upon the part of the persons engaged in her management the exercise of reasonable care, caution and maritime skill; and if these are neglected, and disaster occurs, the towing-boat must be visted with the consequences."

In *Deems v. Canal Line*, 7 Fed. Cas. 3736, there was a clause in the towage contract: "All towing at the risk of the master and owners of the boat or vessel towed."

The Court held, on the authority of *The Syracuse*, that the tug was liable in spite of the contract.

In *Alaska Commercial Co. v. Williams*, 128 Fed. 362, this Court held that a towing vessel cannot re-

lieve itself by contract from liability for the failure to exercise reasonable care and skill for the safety of the tow, saying, by Gilbert, J.:

“We are of the opinion that, if the plaintiff in error had proved the contract to be as in the proposed amendment it was alleged to be, it would not have afforded it exemption from liability.” (Citing *The Syracuse*; also *In re Moran*, *The Somers N. Smith*, and other cases.)

In *In re Moran*, 120 Fed. 556, the Court said:

“Had the agreement been that the dredge and scow, one or both, were to be towed without risk on Moran’s part, it would not exempt him or his tug from damages for injury caused through his own or his servant’s negligence”, citing *The Syracuse*, and many other cases.

In *The Somers N. Smith*, 120 Fed. 569, it was held that

“1. Burden of proof that a contract that a vessel was to be towed at risk of its owners, is upon the towboat asserting such contract.

“2. Even if the contract claimed by the owners of the tug had been established, it *would not relieve the tug* nor her owners from the negligence of the tug or her crew, citing *The Syracuse*, and other cases.”

To the same effect: *Thompson v. Winslow*, 128 Fed. 73, affirmed in 134 Fed. 546.

In *The Oceanica*, 144 Fed. 301, the District Court said, in 1906, that, in *The Syracuse*.

“it was held that the towing steamer was liable for the loss happening through her negligence,

notwithstanding the towage agreement provided for towing the canal boat at her own risk. This principle of maritime law remains unimpeached."

In Circuit Court of Appeals, Second Circuit, 170 Fed. 893, this decision was reversed by a majority of the Court, saying:

"We do appreciate keenly that the decision of the majority of the Court as to the right of a tug to contract against her own negligence is a departure from previous decisions. The question should, and, we hope, will, be set at rest in this case by the Supreme Court."

Judge Coxe, dissenting, relies on the case of *The Syracuse*, saying:

"This decision has been followed by a long line of authorities * * * until the principle has been recognized as an established rule of the admiralty courts, not only by lawyers, but by vessel owners as well. In the case of *The Edmund L. Levy*, 128 Fed. 683, this Court said: 'The agreement of the canal boat to be towed at her own risk did not exempt the tug from liability for damages occasioned by her own negligence.' The wisdom of this rule cannot be doubted. *It ought to be against policy to permit a vessel to contract against her own fault. To allow her to do so begets recklessness, carelessness and neglect.*"

The new doctrine of the *Oceanica* had, it will be seen, a difficult birth in the Court where it originated. This Court will, undoubtedly, prefer to follow its own ruling in the *Williams* case, *supra*, based upon *The Syracuse*, rather than to adopt

a novel doctrine, evolved with difficulty by another Court two years later than the contract in the case at bar was made. Besides, the *Oceanica* case can be differentiated from the case at bar by the fact that there the tow was a barge with her own steering powers, able to help herself in an emergency, and, during towage, partly under control of her own crew, whereas here the lighter was an absolutely helpless wooden box, totally at the mercy of the master of the tug, and as dependent upon the ship towing it as a bale of merchandise is upon the ship carrying it.

The *Oceanica* doctrine being confessedly a “departure from previous decisions” and being announced in 1909, and the contract in the case at bar being made in 1907, the latter is governed by the old, well established rule.

The obligations of the lessee of a lighter which is without motive power, and to which the lessee agrees to furnish the motive power, are analogous to the obligations of the towboat man who furnishes the towage to a helpless tow. The obligation to use due diligence is always present and cannot be evaded even by contract.

B.

Assuming, however, for the sake of argument, that the charterer in this case could have legally exempted himself from liability for loss caused by his own negligence, we maintain that, in fact, the

contract in this case was not intended to, nor did it, in legal effect, relieve the charterer from the consequence of negligence.

a. It must be strictly construed. Contracts purporting to relieve a party from the consequences of the acts of himself or of those acting for him have always received a *strict and narrow construction*.

Contracts exempting *bailees* from liability for negligence must be construed strictly.

5 Cyc. 175.

In *St. Losky v. Davidson*, 6 Cal. 643, pledgors agreed that the goods should be stored by the pledgee at the risk and expense of pledgors, and the Court nevertheless held the pledgors responsible for any damage to goods caused by their removal to an insecure place of stowage.

Contracts purporting to exempt *Towers* from the liability imposed upon them by law are strictly construed (cases cited).

Contracts exempting *Charterers* from liability for negligence are *strictly construed*.

A good illustration of this rule is the case of *The Barnstable*, 84 Fed. 895.

In that case the charter-party made the charterers owners pro hac vice; the navigation of the vessel was the charterer's exclusive business. The charter-party contained this clause: "*The owners shall pay*

for the insurance on the vessel.” She was lost in a collision caused by charterer’s negligent navigation.

The District Court, adopting a broad construction of the clause in the charter-party, decided that this language was “a most unequivocal expression of an intention to assume, and to relieve the charterer from all risks that would be covered by ‘the insurance on the vessel’” (898), and that consequently the owner assumed the risk of a collision lien becoming attached to her through her negligent navigation.

The Circuit Court of Appeals affirmed the decree of the lower Court.

On certiorari to the Supreme Court the decrees of both Courts were reversed (181 U. S. 464).

Proceeding upon the rule that, “*irrespective of any special provision to the contrary*, the charterers would be liable for the consequences of negligence in her navigation” (468), the Court said, referring to the argument made in favor of the charterer:

“If the responsibility for an extraordinary class of damages that is done to another vessel be thus shifted from the charterer, by whose agents the damage is done, and to whom its reimbursement properly belongs, to the owners, it should be evidenced by some *definite undertaking to that effect*, and not be inferred from an obscure provision of the charter-party.

* * * It is scarcely credible that the owners could have intended to assume a liability for the acts of men not chosen by themselves and entirely beyond their control * * *.”

“We find ourselves unable to give it the broad construction that it was intended to fix upon the owners a new and extraordinary liability, which we think could not have been within the contemplation of the parties” * * * (471).

This rule of strict construction of clauses exempting from negligence is a corollary of the general principle that “exceptions or clauses introduced in favor of one party to the contract are to be construed most strictly against him” (*Scrutton on Charter-parties*, p. 13), or as expressed in *Stephens, Charter-parties*, page 102:

“Where the extent of an exception to an obligation is uncertain, it is construed against the person for whose benefit it was introduced.”

In *Price v. Union Lighterage Co.*, 1903 K. B. 750, a contract of carriage of goods provided exemption from liability “for any loss of or damage to goods *which can be covered by insurance*”. The goods were lost owing to the negligence of defendant’s servants. The case raised a question of construction of the clause, viz., whether the clause exempts the carrier from liability for the loss caused by negligence of its servants. (As English law, unlike American law, does not forbid a carrier from exempting himself by contract from liability for negligence, no distinction can be made which might otherwise exist between, on the one hand, a contract between carrier and shipper, and, on the other hand, a contract between owner and charterer.)

The Court said that the words of the clause are

“wide enough to include the loss which occurred in this case, even assuming that it was caused by negligence. And *if* it were right or permissible to deal with this case without regard to the rules of construction which have been laid down in a well-known series of cases * * *, it *might* very well be said that its meaning was that the defendants were to be exempt from liability for insurable losses, whether caused by negligence or not”.

But the Court was forced to the opposite conclusion by the following rule of construction:

“An exemption in general words, *not expressly relating to negligence*, even though the words are wide enough to include loss by the negligence or default of the carrier’s servants, must be construed as limiting the liability of the carrier as insurer, and not as relieving him from the duty of exercising reasonable skill and care. If the carrier desires to relieve himself from the duty of using * * * reasonable skill and care, * * * he must do so in plain language and *explicitly*, and not by general words. * * * It really comes to this, that if a carrier wishes to exempt himself from liability for the negligence of his servants, he must insert in his contract, in one form or another, *something equivalent to what is well known as a negligence clause.*”

Accordingly the Court construed the clause to mean: “*I will use reasonable skill and care * * *, but I will not undertake any liability as insurer for loss or damage which can be covered by insurance.*” The loss being caused by negligence, the defendant was held liable.

In the Court of Appeal (1904, K. B. 412), this judgment was affirmed. The following rule was laid down which bears upon the construction of similar clauses:

“When a clause in such a contract is *capable of two constructions*, one of which will make it applicable when there is no negligence on the part of the carrier or his servants, and the other will make it applicable where there is such negligence, it requires *special words* to make the clause cover liability in case of *negligence*.”

The same principle is forcibly illustrated by the case of

Rosin & Turpentine Import Co. v. Jacob, 11 Asp. 231 (1909).

In that case plaintiffs were the owners of goods on board a vessel. Defendants, lightermen, agreed to tranship the goods to another vessel, in a written agreement providing that “every reasonable precaution is taken for the safety of the goods”, but that the lightermen “will not be liable for any loss or damage, *including negligence*, which can be covered by insurance, and the shipper, in taking out the policy, should effect same ‘without recourse to lightermen’”. (Here, then, we have a stronger case than at bar—an express agreement that the lighterman shall not be liable for negligence, and that the owner must insure himself against this risk of negligence.) Nevertheless the Court held that defendants were not exempt from liability for

loss caused by their negligence. The grounds for the decision were: 1st. That it is settled "that, in these matters, if the clause is ambiguous, it is no protection"; 2nd. That the terms of the contract were ambiguous and might reasonably be read as a promise that every reasonable precaution would be taken. The Court considered that there were two possible constructions of the clause, and that it was bound to adopt the one which did not exempt the defendants from the effects of their negligence.

In the State of New York carriers *may*, by express contract, *exempt themselves* from liability arising from their own negligence; yet the rule is that, when the general words *may* operate without including the negligence of the carrier or his servants, it will be presumed that it was not intended to include such negligence in the exemption. Thus in *Mynard v. Syracuse etc Ry. Co.*, 71 N. Y. 180, the contract released the carrier from "all claims on account of any damage or injury to the property, *from whatsoever cause arising*". (Certainly more sweeping language than the one used in the case at bar.) Yet it was held that the exemption did not include an injury arising from the carrier's negligence.

The presumption is that the owner did not intend to exempt the charterer from liability for loss caused by the latter's own negligence, and the burden of showing that such an intention existed is on the charterer. If the language of the contract

makes *either* intention reasonably possible, the charterer fails to sustain his burden of proof, and the Court will find that the parties had no such intention.

To apply the foregoing principles to the case at bar. There is here no explicit exemption from liability for negligence and its consequences; on the contrary, the language is: "*You are to be responsible* for these lighters, and whatever gear is on them when you take them", and again: "You are to return them in as good order and condition as when you get them". Under this language there is no room for immunity in case of negligence.

The fair meaning of the agreement that the charterer *shall be responsible* for this property, while he rents it, is that he must take care of it. "Responsible" means: "subject to the obligations", "legally answerable for the discharge of" the obligations implied in the relation between charterer and owner.

The contract continues: "You, the charterer, are to return them in as good order and condition as when you get them, happenings covered by their present policies excepted."

Respondent asks the Court to construe this to mean:

"We must return the lighters in as good order and condition as when we get them; but we are immune if we destroy them by our negligence."

We submit that such a construction is shockingly unreasonable. We believe that the Court will give them the sensible and natural interpretation that makes them a consistent, sane business proposition, viz.:

You, the charterer, "are to be responsible for these lighters"; "you are to return them in as good order and condition as when you get them; you are to use them with reasonable skill and care, but you are not to assume the great liability of an insurer against maritime risks covered by our present policy".

If the obligation of the charterer to use ordinary care in the handling of the lighter were stricken from the contract by construction, as respondent suggests, the words: "You are to be responsible for these lighters, and are to return them in as good order and condition as when you get them" would become meaningless, and would be likewise stricken out. The clause, in effect would be reduced to this absurdity: "You are to be responsible for these lighters *only* if you choose to injure or destroy them wilfully and deliberately."

Every presumption and inference in this case, and common sense itself, rebels against such a construction.

The simple and natural construction of the words of the contract leads to a more reasonable result: The meaning of the exception is:

You are not to be responsible for "happenings covered by their present policies of insurance". What are these happenings? The "present policy" in the case answers this question: "They are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, reprisals, takings at sea, arrests, restraints and detrainments of all kings, princes or people, of what nation, condition, or quality soever, barratry of the master and mariners, and all other perils, losses and misfortunes, that have or shall come to the hurt, detriment, or damage of the said vessel". Omitting the adventures irrelevant to this case, the happenings covered by the policy are perils of the seas, and all other perils * * * that shall come to the hurt * * * of the vessel, and the exception therefore provided that respondent should not be responsible for perils of the seas and all other perils that shall come to the hurt of the vessel. It did not provide that respondent should not be responsible for the consequences of its own negligence.

This is the *natural* construction of the words. The *strict* construction required by the authorities in such cases affords additional protection against the claim that the present charter promises immunity to the charterer in advance for his negligence. To arrive at the latter result, the language of the charter must be changed, expanded, violated, and a nice rule of insurance law be read into it

which the parties to this informal charter may be conclusively presumed to have been in ignorance of. The exemption in the *charter* covers perils of the sea and not negligence. It is to be kept in mind that the Court is construing a charter-party, and not a policy of insurance. Even from the point of view of insurance law it is only in a *secondary* sense that it can be claimed that *negligence* of the insured is covered by the insurance under the policy. If the proximate cause of the loss is a marine peril, yet the accident is *remotely* occasioned by the negligence of the assured or his agents, the protection of the insurance applies; but this is not, because negligence is a remote cause, but because a sea peril is the proximate cause. The latter fact determines the liability of the insurer. The insurance does not protect against negligence; it protects against marine perils. It "covers", in the primary sense, only happenings of the seas, perils, losses and misfortunes connected with the sea. To contend that an exemption of liability for marine losses includes an exemption of liability for negligence is doing violence to language, and is contrary to every settled rule and presumption applying to such cases.

Granting that the secondary meaning is legally *possible*, the Court, construing the clause in question strictly, and most strongly against the party to be benefited thereby, should find that it does not cover an exemption from negligence. General words are not sufficient to produce such an effect; but such

an intention must be expressed in plain language, and explicitly. Only an insurance lawyer can see the remote connection between a marine insurance policy, and negligence of the insured; and the parties to the informal contract in suit, had they contemplated relief from negligence, would certainly have used some such word as "negligence". The general words "happenings covered by the policy", to the layman, cover the adventures and perils connected with the sea and no more; only to the technical mind of the marine lawyer could they connote the idea of negligence. It may be conclusively presumed that a layman, making an informal agreement in letter-form, had not enough technical knowledge to express an intention to exempt from negligence by words which have no apparent connection with negligence.

As said by the Admiralty Court in *The Forfarshire*, 11 Asp. 158, 161:

"It would be monstrous to suppose that it was in the contemplation of these two parties that, whatever neglect there might be on the part of the defendants to perform their part of the contract, still the plaintiffs would be responsible if any accident happened to the ship. * * * I do not think it was intended to protect the defendants against the neglect on their part to carry out their part of the contract. * * * I think it is perfectly plain that there was on each side an undertaking—the defendants to do certain things, and the plaintiffs undertaking to bear the risk if those things were done. The defendants have failed to do that which

they undertook to do" (viz., to transport a vessel from one place to another *with care*).

The provision:

"You are to return them in as good order and condition as when you get them" *enlarges* the responsibility of respondent from that of bailee to the liability of an insurer. The *liability of an insurer* is cut down by the following express exceptions:

- ' (1) Reasonable wear and tear,
- (2) Happenings covered by their present policies.

If a *bailee's* liability were lessened by the exceptions mentioned, it might be argued with force that exception (2) is unmeaning unless it includes negligence. But if we keep in mind that an *insurer's* liability is lessened by the exceptions, it follows as a natural conclusion that the "happenings" referred to are marine accidents, and that the respondent still remains liable for *negligence*. This conclusion is confirmed by the wording of the first exception: "*reasonable* wear and tear". By inference *unreasonable* wear and tear, viz., such wear and tear as a reasonable or careful man would not produce, would still be within the scope of respondent's liability.

That respondent, Bennett & Goodall, understood that they were bound, by this contract, to use care, and that they were liable for negligence appears

from their sub-contract made with Napa Gravel & Material Co.

Had Bennett & Goodall had the intention to make themselves immune from liability for negligent use of the barge by their contract with appellant, it would have been an act of supererogation on their part to enjoin care in the use of the barge upon their sub-charterer. What, in fact, did they do? In their contract with their sub-charterer, they insist (Ap. p. 57, 5th) that "second party shall be *fully responsible for*, and shall pay on demand *any and all* damages and deterioration to said barges not directly due to ordinary wear and tear", and again in 7th, that

"second party shall surrender the same entirely free and clear and exempt from and of all incumbrances, libels, liens, attachments and claims of every kind and description, whether for wages, services, repairs, supplies, materials or necessities or otherwise, and absolutely exempt from any and all demands affecting said barges, or first party or the owner thereof, made or suffered by said second party, its agents, employees, or others acting or claiming to act by, for, or under it."

Whatever the legal effect of this provision may be, it cannot be claimed to give the sub-charterer license to be negligent in the use of the barge. It holds him to strict accountability for losses due to his negligence. It is quite improbable that respondent would have made such stringent provisions, had it not been for its own protection against liabilities

by which it considered itself bound under its contract with appellant.

The same intention to submit to liability for negligence, and make the liability of their sub-charterers co-extensive with such liability, must be inferred from the fact that Bennett & Goodall obtained a bond from the sub-charterers in which it was provided that the surety shall not be liable for the payment of loss "*by accident or fire*" (Ap. p. 49). These two exceptions do not cover negligence or misconduct. The necessary inference is that the surety *shall be liable for the payment of loss caused by negligence or misconduct of the principal, the sub-charterer*. In other words, respondent, by accepting this bond, indicates its intention that the sub-charterer shall be responsible to it for negligence or misconduct. That the terms and conditions of the sub-charter are intended to be the same as the terms and conditions of the charter between Bennett & Goodall and American Hawaiian Steamship Company is expressly recited in the first paragraph of the sub-charter, after the word "Witnesseth" (Ap. p. 44), and appears also from a comparison of the two charters. It therefore follows that Bennett & Goodall, in making their contract with appellant, intended to assume the obligation of care in the use of the lighter.

If it were otherwise, and as respondents claim, Messrs. Bennett & Goodall could recover from the

surety company the sum of \$7,500 on the bond, on the ground that the sub-charterer destroyed the lighter negligently, but the owners of the lighter could recover nothing from Messrs. Bennett & Co., on the ground that the sub-charterer destroyed the lighter only negligently, without being wilful. The negligence of the gravel company could be used by respondent as an instrument of attack whereby to claim and collect from the surety company, and at the same time as a weapon of defense, whereby to defeat the claim of the owners. So charming a method of unjust enrichment could hardly be presented in a Court of justice without drawing blushes even from the artificial cheeks of an incorporated party.

A proper construction of the contract between appellant and respondent, in the light of the principles and facts stated, leads to the irresistible result that the latter was to be held liable for the natural consequences of the negligence of itself and agents, servants and representatives.

II. THE LOSS WAS CAUSED BY RESPONDENT'S MISCONDUCT.

A. *The burden of proof is on respondent to show that the loss was not due to its negligence.*

B. Respondent has failed to sustain this burden of proof.

There is a conclusive presumption of negligence, and the evidence proves by preponderance that the loss was due to the misconduct of respondent, amounting to at least negligence.

A.

In *Swenson v. Co.*, 160 Fed. 459 (C. C. A. 2nd Circuit), a pile driver was chartered by respondent and was lost while being towed and in respondent's possession. The Court held:

"As such an occurrence is not in the ordinary course of things, the burden was thrown on the respondent as a bailee to show how the loss took place, and that it was not caused by its negligence."

In *Terry v. Wrecking Co.*, 168 Fed. 533 (C. C. A. 2nd Circ.), under similar facts, the Court said:

"The vessel having been injured while in the exclusive possession of the respondent, as bailee, the burden is upon it to show:

"1. How the injury occurred.

"2. That it was free from negligence."

In the latter case "the respondent did show the circumstances of the accident, but offered no evidence to show the cause of the sinking", and the Court held that the respondent "failed to sustain the burden of proof imposed upon it as a bailee in possession", decreeing that the owner recover damages for the loss.

B.

1. How did respondent sustain its burden of proof that it was not negligent? The testimony discloses that there were *three eye-witnesses* who could have testified to the facts of the accident: J. P. Lattimore, captain and engineer of the gaso-line launch that had the lighter in tow when she met with the accident; a bargetender on board of the lighter (Ap. p. 327), and a man on the tug (Ap. p. 339). All of these three men were employees of the sub-charterers, for whose actions the sub-charterers were responsible to respondent, and respondent to libelant. None of these witnesses were produced by respondent to show how the loss occurred, although their testimony would be the only legal evidence by which respondent could establish a defense, and no excuse appears for their non-production.

“It is familiar doctrine that the failure of an employer to call a witness who was in his employ at the time of the accident, and is presumed to be friendly and to have some knowledge of the accident, without any attempt to explain the reason of the failure, raises a strong presumption that the testimony of the employee would be damaging to such party.”

Hicks v. R. Co., 62 N. Y. Supp. 597, 599.

“Where evidence which would properly be part of a case is within the control of a party whose interest it would naturally be to produce it, and, without satisfactory explanation,

he fails to do so, an inference may be drawn that it would be unfavorable to him."

Hall v. Vanderpool, 156 Pa. St. 152.

This is deemed "one of the strongest and most satisfactory rules for weighing evidence", it being said that,

"Since experience teaches that a man will use every means in his power which would avail him in the hour of trial, physically or as a litigant, it may well be expected that he would call a witness who is at hand and cognizant of the facts in dispute, if he did not know that the witness would testify against him."

Moore on Facts, sec. 563.

In *Union Trust Co. v. McClellan*, 21 S. E. 1025, the Court says:

"Where the burden is on a party to prove a material fact in issue, the failure, without excuse, to produce an important and necessary witness to such fact raises the *conclusive presumption* that such witness's testimony, if introduced, would be adverse to the pretensions of such party."

Cited also in *Garber v. Blatchley*, 51 W. Va. 147.

From these facts and authorities it follows not only that respondent, not having shown how the loss occurred and that respondent was free from negligence, its conduct raises a presumption, and a conclusive presumption, that the testimony of the eye-witnesses, if introduced, would have shown that the loss occurred through respondent's negligence.

2. A presumption of negligence arises on the very *pleadings*. In respondent's answer it is *admitted* that the lighter *was lost* during the term of the charter, while its sub-charterer, the Napa Gravel & Material Company, was in possession and control of it. In the absence of any further fact, this raises a *presumption of negligence*. Respondent, in effect, pleads: "*Mea culpa*, but you must go to the insurance company for indemnity" (Ap. p. 16). Where, as here, the bailee does not return the property bailed, he is *presumed to have acted negligently*. In *Claffin v. Meyer*, 75 N. Y. 252, it was held that, where there is a failure to account for the property, followed by a failure to deliver to the bailor, a *prima facie* case of negligence is made out. The rule is based upon the presumption that the bailee has exclusive knowledge of the facts, and that he is able to give the reason for the loss of the property, if any exist other than his own act or fault. The presumption applies with particular force in this case, where the lighter was placed by respondent in possession of a third party using it in a different business from that of respondents.

3. The slim supply of *facts* which *appellant* was able to extract from a prejudiced witness on the question how the accident occurred is sufficient to show that it was *in fact caused by the negligence or misconduct of those for whose acts respondent is responsible*. On March 30, 1910, being about 3 years after the accident, and about 2½ years

after the filing of the libel, when libelant was advised that J. P. Lattimore, the man in charge of the tug, was about to leave the jurisdiction of this Court (Ap. p. 335), libelant took his deposition in an effort to ascertain the truth. The testimony of this witness shows the great reluctance which he felt in throwing light upon the transaction. It was natural that he should be prejudiced in favor of his employees and of himself in detailing the performance of a duty which he owed to those employers. Yet his testimony discloses enough to prove negligence, if not of himself, yet at any rate of his employer, the sub-charterer of the lighter. His description of the accident at Horseshoe Bend in Napa Creek is as follows (references being to Apostles):

He was in charge of a gasoline launch of 50 horse power. It was not powerful enough to tow against the tide (p. 267). His gasoline launch started, in a very dark night (p. 330), from a place in Napa Creek, with the heavily laden lighter in tow, about 10 o'clock P. M., a little before or about at high water (pp. 324, 325), "the meanest tide to get ashore on" (p. 268). The ebb-tide "helps you along a good deal" (p. 325). At the time he got to Horseshoe Bend, it was very swift ebb-tide (pp. 185, 186); the bend was a particularly dark spot (p. 246), and a "very sharp bend", where "one has to be very careful in navigating" (p. 261). The witness knew that, just before reaching Horseshoe Bend, a reef

was running out from the portside of the creek, and he had to avoid it with his launch and tow (p. 327). He avoided it by keeping to the starboard bank (p. 328).

“Q. Did you say that the barge sheered to starboard just before you reached the bend?

A. Yes, sir” (p. 328).

“Q. What occurred at that bend?

A. The barge took a sheer to starboard and I made an effort to pull her away from the starboard bank; whether it was an eddy, or what it was, she took a sheer to port. When I got the boat around and I got her clear of the starboard bank, I straightened her up, and whether it was an eddy or what it was, I don’t know, she took a sheer to port and she went ashore and pulled the barge with her” (p. 325).

She went ashore on a “hard bank” (Ap. p. 122). It requires no eddy, nor any other *deus ex machina*, to explain this transaction. In the effort to avoid the reef on the left side, the launch had pulled the barge to the starboard side of the creek. Thereupon the witness made an effort, at the bend, “to pull her away from the starboard bank”. The very natural effect of this effort was that the small launch, pulling the huge barge from the starboard bank, and aided by the ebb-tide, “took a sheer to port and she went ashore and pulled the barge with her”. The eddy was here introduced by witness for the purpose of giving his launch a mysterious push, beyond his control, towards the port bank of the creek, and of furnishing an excuse for going ashore. The natural explanation is, however, that

the little launch could not get the big lighter away from the starboard bank, unless she headed *across* the creek at the bend and, under the impetus of her own effort and the ebb current at the bend, landed on the opposite bank "and pulled the barge with her".

Much light is thrown upon the transaction by the testimony of Thomas Crowley, Lattimore's employer, who testified as witness for respondent:

"It was a fearful tide; he had nothing much to do but just keep the barge straight, and she would go down herself" (Ap. p. 88).

The same witness testified:

"You don't want to go down too fast with too large a tide, just slowly down, slow with slack water, have just a slow tide with him, that would probably be the safest time for him.

* * *

Q. The more rapid the ebb-tide is, the more dangerous it is, is it not?

A. He would go down too fast, and that is all.

Q. He must not go down too fast?

A. Because the boat going down too fast is *likely to take a sheer* and go ashore.

Q. Your launch could not retard the motion of the barge in that case?

A. No, he was towing with a headline.

Q. All the launch could do is pull it off the bank?

A. Yes, zig-zag down."

And respondent's witness Fisher testifies:

"A. Well, if you do not *watch* in coming around the turn, it (the ebb-tide) will set you

more over to the shore; *if you watch* coming round the bend and get your barge swinging the proper way, then there is no difficulty at all" (Ap. p. 121).

Again:

"The stronger the tide runs, the more careful you have to be in coming around the bend" (p. 122).

Witness Fox:

"It is a very dangerous proposition to take a loaded barge around a difficult bend or a sharp bend, where the ebb-tide is bound to set you in the bend" (p. 261).

Also Capt. Cruthers:

It was not safe to turn the bend, "Because the barge would go into the bend, I don't think she could swing her out—the lighter would go into the bend, I don't think he would have power enough to swing her out" (p. 278).

It is submitted that, in a dark night, the operation of "watching" at one and the same time, reefs jutting from one bank, also the threatening opposite bank, also the heavy barge *behind* the launch, and also the sharp bend *ahead* of the launch, is, under the circumstances, an operation of taking desperate chances.

The locality was dangerous, as respondent's witness Fisher shows:

"It would depend on high water at night; just *before high water* we get over the rocks, we leave at high water at the Heads to get over the rocks *before* high water there.

“Q. It would be *much more dangerous to get through on the ebb-tide in that place?*

A. *Yes, sir.*

Q. You would consider it a very dangerous place if you got caught there while the ebb is running rapidly, wouldn't you?

A. Yes, sir. If it is running very strong and the tide is going down rapidly, and you get caught there, *at that time, before the reef was taken out, it was dangerous*” (pp. 123, 124).

Mr. A. Hatt, Jr., also testifies:

“They regard an ebb-tide as dangerous” (p. 250).

The testimony of Christian Johansen, another witness for respondent, also shows the dangers of the place where the accident took place, and the recklessness with which chances were taken on the destruction of the lighter. Although obviously anxious to serve his side, he testifies on cross-examination:

“Q. Would there be any difficulty, if the launch with her tow arrived at Lone Tree Bend (other name for Horse Shoe Bend) at the time when the ebb is falling rapidly?

A. I think there would be, yes.

Q. And besides its being dark, and besides a man being in charge who had never gone over that place before?

A. I think that would be pretty risky.

Q. You think that would be very risky, don't you? A. Yes.

Q. In other words, it is your opinion, is it not, that it would require a very considerable skill to get around that point there with a gasoline launch of 50 horse power having a very large barge in tow, a barge which is 38 feet

wide and at least 120 feet long, and is heavily loaded, that has a large load on her of 400 cubic yards—you think that would be a pretty risky business, wouldn't you?

A. *Yes, in a falling tide, in an ebb-tide.*

Q. The tide makes a big difference?

A. Yes.

Q. What difference does it make?

A. It makes that much difference that if you have to run into the bank and get stuck, get on to the bank, you can't get her off again.

Q. If the tide falls rapidly, it takes the barge down in a straight direction rapidly, and she is likely to go on shore, is she not?

A. Yes" (Ap. pp. 151, 152).

Respondent's efforts to straighten out the testimony of its witness were unsuccessful:

Mr. DENMAN.

"Q. Coming down Napa Creek, you always come down on the ebb-tide, don't you?

A. No, sir.

Q. You don't buck the flood coming down there, do you?

A. Always.

Q. You always buck the flood?

A. Yes.

Q. You do not come down, float down with the ebb-tide?

A. No" (p. 152).

Mr. DENMAN.

"Q. Don't you know it is customary for these gravel barges coming down there to come down on the ebb?

A. They usually start before high tide up there; generally start *at high tide at the bar; that makes about two hours before high water up there.*

Q. You usually get the ebb somewhere around Rocky Beach, don't you?

A. No. I mean a mile or so after we get by the Rocky Beach; *it is the regular practice to go through there at rising tide*" (p. 153).

Again:

"It is necessary to have time enough *to get over that place* on rising tide" (pp. 154, 155).

Again:

"Q. Mr. Johansen, Mr. Bell spoke of this element of risk at the particular spot, (Horse Shoe Bend) being that if your barge gets ashore, it will be more difficult to get her off at the falling tide than it would be at a rising tide?

A. Yes.

Q. That is not the only element, Mr. Johansen. You have stated before, have you not, that another element of risk and of danger is that, in a falling tide, the barge is more likely to go ashore?

A. Yes.

Q. That is another element, is it not, of danger?

A. Yes" (p. 157).

Again:

"Mr. HENGSTLER. Q. If he left exactly at high water, and he was going for two hours, and two hours afterwards he got to this Lone Tree Bend, would he be in danger then?

A. Sure" (p. 161).

This is exactly the danger to which Lattimore, the man in charge of the launch, and the only eyewitness of the accident, either deliberately, or ignorantly exposed the loaded barge. He says:

“Q. Do you use the tide in towing a barge down Napa Creek?

A. Yes, sir.

Q. In what way?

A. *To help it along* to get down.

Q. When do you start, as a rule, with reference to the conditions of the tide?

A. Do you mean with a loaded barge like that?

Q. Yes.

A. You generally start about high water” (p. 324).

Again:

“A. You leave your destination about high water or something like that.

Q. Why?

A. As close to high water as you can, and then you start down the creek; the further you come down the creek, naturally the quicker you get the ebb-tide” (p. 325).

Again:

“Q. You say the condition of the tide at the time you left Napa, or the upper portion of the creek nearest to Napa, was about flood tide?

A. Yes, sir.

Q. Was that the most favorable tide for your operation?

A. I say it was very high water.

Q. Was that the most favorable condition of the tide for coming down the stream with that tow?

A. Yes, sir” (p. 336).

H. G. Bell, familiar with the navigation of Napa Creek for 11 years, says:

“The danger of an ebb-tide has a tendency to swing you in the bend” (p. 257).

Whatever negligence is involved in picking the dangerous time, is imputable to respondent.

In answer to questions by his counsel, Captain Bennett testifies:

“Q. I mean as to *picking the time* as to dispatching the various barges, you had nothing to do with that? A. No.

Q. That is left entirely to the man of the launch? A. Yes” (p. 165).

“Mr. Burgess, who was doing this loading, dispatched him” (Mr. Bell’s testimony, p. 227).

After some time witness succeeded in heaving the launch off the shore. But nothing was done to save the barge. No attempt was made either to pull her off, or to relieve her from her load.

“Q. What, if anything, did you do in order to get the barge afloat?

A. I could not do very much of anything, being that the tide was falling pretty quick.

Q. Did you try to get the barge afloat?

A. That I don’t remember now.

Q. You do not remember whether you pulled on her after you were afloat with your tug?

A. No, sir, I don’t remember” (Ap. p. 329).

This latter testimony shows two things: First, the failure to make any attempt to save the barge from destruction; Second, the disposition of the witness to keep in the dark facts which it was hardly possible to forget and which presumably either reflected upon his competence or compromised his employers. Also he “don’t remember now, whether I could have steamed her off or not”

(p. 330). Witness had "the only *launch* up there that was towing these barges"; but there were several *tugs* there towing barges (p. 333). The evidence shows that the launch was not powerful enough to steer the heavily laden barge safely between the reef extending from the left side of the creek and the right bank, just before reaching Horseshoe Bend. To avoid the reef, "you keep to the starboard bank" (p. 328). The launch pulled her tow to starboard, but evidently pulled her too far; for "the barge took a sheer starboard, and I made an effort to pull her away from the starboard bank" (p. 325). This effort would have been unnecessary, had the barge been under the control of a tug powerful enough to control her unwieldy tow. It is clear that the launch, in any critical place of the river, was only able to give an impetus to the heavy barge in a given direction, but was not able to control or check the impetus. After the barge was once started to starboard, it proceeded too far to starboard; after being started to port, she went too far to port. The effort to keep the barge off the starboard bank, just above the bend, was successful. "When I got the boat around and I got her clear of the starboard bank, I straightened her up, and * * * she took a sheer to port and she went ashore and pulled the barge with her" (p. 325). Evidently the effort of the little launch to save the huge barge from going ashore on the starboard bank was a mighty effort; the head of the launch was turned across the river, and, aided by the ebb-

tide racing around the bend, she went ashore on the port bank of the river and pulled the barge with her. This shows again the insufficiency of the launch to control her tow; her only means of escape from standing on one bank was to run upon the opposite bank. Add to the critical elements thus far mentioned the facts that the launch relied upon the ebb-tide to float the barge down the sinuous river (pp. 324, 325); that the night was a dark night; that this launchman had never before taken the barge as high up the creek as Horseshoe Bend (p. 332), nor any barge of the same size; that, although on his previous towing expeditions, in safer places further down the creek, he had never had a barge tender, he, on this occasion, "made a kick for a man" (p. 343) when he was sent higher up than the dangerous Horseshoe Bend; and the reason for the accident becomes apparent. To send the heavy barge down the winding creek, on a rapid ebb-tide, in charge of a small launch, was in itself negligence, even if the launch had been in control of an experienced hand. To send her down in charge of a green hand, in a dark night, and under the circumstances of this case, was clear recklessness.

"The very fact that the tug was unable to tow the vessel, that is, unable to do the work, is evidence that she was insufficient, or that there was inefficiency or want of care or skill, or energy or diligence on the part of her master or crews."

The Marechal Suchet, 11 Asp. 553, 557.

A presumption of negligence arises from the simple occurrence of the accident in this case, under the rule of the Supreme Court in *Transportation Co. v. Downer*, 11 Wall. 129, 134; for no injury ordinarily arises from towage in similar cases when due care is taken in its performance, and the injury here was caused by the mismanagement or insufficiency of a thing over which the respondent had immediate control, and for the management and sufficiency of which he is responsible.

The presumption of negligence arises against a bailee for hire, where it appears that the subject of the bailment was injured or destroyed while in his custody by an accident such as, in the ordinary course of things, does not happen when due care is exercised.

Swenson v. Co., 145 Fed. 727;

The Genessee, 138 Fed. 549.

It is not necessary, however, in this case, to rely upon presumptions alone in order to establish a case of negligence amounting to recklessness against those who sent this heavily laden barge to her doom in the night of the accident.

The locality was full of bends and hazards (p. 341); the time was a dark night; the tide was a strong ebb-tide which, in this so-called "tide work", furnished the locomotive power to the barge in the straight parts of the river. It was dangerous work, even for a tug of sufficient power to keep her off the banks around the bends, and it required a pilot

of great skill, even in the daytime. To undertake this work at night, without knowing this creek by heart, was recklessness.

The man in charge had never before towed the barge, or any barge of the same size, higher up the creek than a point "B" below the dangerous Horseshoe Bend (Libelant's Exhibit 1, Apostles, p. 332). While his testimony is that he had another man on board his launch, he himself seems to have acted as pilot and engineer without assistance in a locality unfamiliar to him, groping down the creek in the dark, the heavy barge behind him shooting from bank to bank at the mercy of the tide and currents, the little gasoline launch unable to keep her off the shore. Had the other man on board the launch contributed in any way to relieve the responsible and perilous position of this launch, is it not reasonable to suppose that respondent, upon whom the burden of proof rests, would have produced him as a witness? Lattimore's testimony proves conclusively that his gasoline launch was unseaworthy for the purpose for which she was used that night; that, just above Horseshoe Bend, she kept the barge with difficulty from going on the starboard bank, and, in her effort to do so, "*she took a sheer to port and she went ashore and pulled the barge with her*" (p. 325). The expert testimony of witnesses produced by respondent, to show that this gasoline launch could do the work as well as a tug not only violates common sense, but is also flatly refuted by

the unanswerable *fact* that the gasoline launch *did not do the work*.

The hire of a lighter of this description contained an *implied agreement*, on the part of the charterer, to use it only in connection with towboats that had sufficient power and were sufficiently manned to handle the lighter safely. As long as the charterer used them in smooth waters and where they were being propelled on straight courses, towage by a gasoline launch might be sufficient; but when the charterers took them into waters involving special hazards, like winding rivers with currents, eddies, snags, sudden bends, it was their duty to make special provision for such emergencies, to furnish tugs of sufficient power, instead of the weaker and cheaper launches. The obligations of the charterers in this case were at least co-extensive with the obligation of a towboat company. What the obligations of the latter are is well illustrated in the case of

Winslow v. Thompson, 134 Fed. 546 (C. C. A., 1st Circuit).

It is there held that a tug is bound to make known to the tow any special hazards involved in the towage, and that, if she fails to do so, she is, apart from liability for negligence, liable for the consequences. In the case at bar respondents should have secured libellant's consent to the use of the lighter, by themselves or their sub-charterers, in waters and at times and under circumstances which involved special hazard.

The case last cited also touches upon the question of the responsibility of the respondent for negligence or misconduct on the part of the towboat company in furnishing an insufficient launch, and an incompetent master for the navigation of the launch. In that case the consignee of the cargo of a vessel had assumed, by his contract, the duty of furnishing towage for the vessel; he employed a towing company which performed the service in a negligent manner. It was held (128 Fed. 73) that the consignee could not relieve himself from liability for the manner in which it was performed by the employment of the towing company, and was responsible to the vessel for any damage caused by the negligent towage. The Court reviewed many cases which hold to the same effect (p. 79 to p. 81), rejecting the "independent contractor" theory as applied to such cases. The principle upon which such cases rest is expressed in *Gannon v. Ice Co.*, 91 Fed. 539 (cited in the Thompson case, 128 Fed. page 79) as follows:

"That the respondent company could not absolve itself from its duty to take care of the boat by delegating that duty to another; that the liability of the respondent company does not rest upon the ground that the boat was injured by its servants, but upon the ground that it was injured by its *subusers*."

This principle identifies the negligence or misconduct of Lattimore, or of the towboat company, or of the Napa Gravel & Material Company, with the negligence or misconduct of respondent Bennett &

Goodall. The same principle was applied in *William H. Beard Dredging Co. v. Hughes*, 121 Fed. 808 (C. C. A., 2nd Cir.), where the Court held the charterer of a scow liable for injuries to the scow resulting from the negligence of a tug hired by him to tow the scow. See also *The Naos*, 144 Fed. 292, and *Smith v. Bouker*, 49 Fed. 954.

The real cause of the loss of the lighter, in the case at bar, was the misconduct of the Napa Gravel Material Company in shooting the small launch, impeded by the huge, overloaded lighter, down the sinuous course of Napa Creek, in a dark night, in charge of an inexperienced launchman and at the mercy of a rapid ebb-tide.

Respondent Bennett & Goodall, the hirer of the lighter, is responsible for the negligence and misconduct of Napa Gravel & Material Company, to whom the lighter was rehired.

Story, Bailments, Sec. 400;

Alabama etc. Ry. Co. v. Burke, 27 Ala. 535.

III. ASSUMING, ARGUENDO ONLY, THAT RESPONDENT WAS, BY THE CONTRACT, EXEMPT FROM THE CONSEQUENCES OF ITS NEGLIGENCE, RESPONDENT WAS STILL LIABLE FOR THE LOSS ON THE GROUND THAT THE INSURANCE COMPANY COULD MAKE A SUCCESSFUL DEFENSE AGAINST A SUIT ON THE POLICY.

A. *Because the loss was not caused by perils enumerated in the policy.*

The immediate cause of the loss was not a peril of the seas. It is incumbent upon respondent to

show what the cause of the loss was, and libellant is entirely dependent upon the evidence furnished by respondent. Respondent has furnished no evidence, although there were three persons present at the time of the accident. The evidence of the man in charge of the launch is that HE *pulled the barge ashore*, in his effort to save her from going on the opposite shore. The three stages preceding the stranding were:

First. I made an effort to pull the barge away from the starboard bank;

Second. When I got the boat (launch) around and I got her (barge) clear of the starboard bank, I straightened her (launch) up, and she took a sheer to port and she went ashore;

Third. And pulled the barge with her (Lattimore, Ap. p. 325). "She went ashore and pulled the barge with her"—clearly the proximate cause of the stranding of the barge was not the action of winds or waves, but the act of the boatman in pulling her on the left bank to prevent her from grounding on the right bank of the river. His positive operations in this dilemma caused the loss. Being pulled upon a river-bank by an unskilful or insufficient towboat is not a peril of the seas. The responsibility for placing him into the dilemma of being wrecked either on one bank or the other at this dangerous bend in the creek, in the dark night, when the heavy barge controlled the launch instead of vice versa, rests with the respondent. Lattimore's dilemma was the natural consequence of

sending him down the creek under the circumstances, and the facts which show his inexperience and unskillfulness demonstrate wilfulness and recklessness on the part of the gravel company that employed him.

The *direct, efficient, and operative* cause of the loss was not a peril of the sea, but was the negligence or misconduct of respondents. The natural and mechanical effect of that negligence was the stranding and loss. Striking the bank was only part of the act of the launchman of projecting her there, and *his act* was the proximate cause of the loss. The proximate cause of a loss is to be understood, not necessarily that cause which instantly precedes the loss in point of time (here the stranding), but the dominant cause, the cause but for which the loss would not have occurred, and between which and the loss no other distinct cause intervened.

Dole v. Insurance Co., 2 Cliff. 431;

Northwest Trans. Co. v. Boston M. Ins. Co.,
41 Fed. 793.

Here the loss was directly referable either to the act of Lattimore in pulling the barge ashore after his launch, or to the failure of the three persons who were in the launch and barge to make any effort to save her after she was on shore—both causes not covered by the policy.

Besides, the insurance company might well have made the defense that, while it insured the barge

while "employed in navigating harbor of San Francisco and tributaries, including Sacramento River", the insurance was against perils of the *seas*, and not the peculiar perils incident to a river, and more particularly the upper portions of a winding river.

B. *Because the loss was caused by a wilful act.*

The distinction between wilful and negligent acts is well illustrated in the case of

Standard Marine Ins. Co. v. Nome Beach etc. Co., 133 Fed. 636, 167 Fed. 119,

decided by this Court.

In that case the loss resulted directly from the master's act in undertaking to force the vessel through floating ice in order to arrive more quickly at Nome. Such conduct was held to be not mere negligence, but wilful omission to perform a legal duty, and an intentional commission of a wrongful act, and it was held that the insurer was not liable for loss caused thereby.

On the second trial of the case (167 Fed. 120) a custom was shown for vessels bound for Nome to enter the floating ice by selecting the lanes or channels and following from one opening to another. In the case at bar a custom is attempted to be shown, whereby the tide is being utilized for the purpose of towing down Napa Creek. Granting that such a custom exists, subject to proper condi-

tions, it could not be claimed that respondent can be protected by a custom to float the lighter down the dangerous bends of Napa Creek *under the circumstances of this case*, towed by an inadequate launch in charge of an inexperienced person, shooting through between reefs and rocky banks past obstructions, over whirls and eddies, and round sharp curves, in a dark night. The Napa Gravel Company who sent the huge lighter down the creek under such circumstances, was guilty of wilful omission to perform a legal duty, and the intentional commission of a wrongful act.

This Court, in its opinion in the *Nome Beach* case (133 Fed. 649), cites with approval Judge Clifford's language in a case (*Williams v. Ins. Co.*) where it was held that the loss in question was not within the protection of the policy, on the ground that the master, in crossing a bar, "knew that the depth of water on the bar was such as to make the attempted passage dangerous". In the case at bar the Napa Gravel & Material Co. was charged with knowledge that the attempted passage around the Horseshoe Bend in Napa Creek, through a channel narrowed by the reef jutting from the left bank above the head, was dangerous.

C. *Because the loss was caused by the unseaworthiness of the barge.*

Duncan Buchanan, marine surveyor and master mariner, examined the barge as she lay on the

strand, and testifies (Ap. 283) that, from the special examination which he made for the purpose of determining the reason why she collapsed,

“A. The conclusion I arrived at was that there was an unreasonable load upon the barge; otherwise she could not have collapsed in smooth water in Napa Creek.”

On cross-examination he maintains that there are only two possible explanations for her collapsing after going ashore:

“A. I think it was something defective either in the structure or too much weight on the barge that was the cause of the breakup” (Ap. p. 287).

Respondent's witness Fisher testified:

“A. In some cases where it runs aground, *and the tide is falling very rapidly*, you stand a chance of not getting off so easily; the tide falls away from the barge too rapidly; *it leaves the whole weight of the load on the barge*” (Ap. p. 122).

To the same effect is the testimony of A. Hatt, Jr. (Ap. p. 243).

This describes the probable fate of the barge.

What the weight of the load on the barge was, is not shown by proper evidence. Mr. Bell, secretary of the Napa Gravel & Material Company, an interested witness, testifies that 400 cubic yards of gravel were loaded on her (p. 222), but admits that he does not know it of his personal knowledge (223). It appeared at the trial that Mr. T. Burgess

loaded the barge, and it is again significant that this witness was not called by respondent or the Napa Gravel & Material Company to testify to this material fact (p. 224). In the very nature of things there must have been other witnesses instrumental in the loading, and cognizant of the circumstances connected with the loading—all witnesses employed by respondent or the gravel company. Their non-production by a party that had the burden of proof on the issue of overloading, raises the legal inference that their testimony would have been unfavorable to respondent.

The evidence shows that, in the navigation of Napa Creek, it was nothing unusual—it was to be expected—that vessels would go aground. It was therefore the duty of the gravel company to load her only to a point where the weight of the load would not have the effect of breaking her up in case she should go ashore. Respondent claims that the lighter was not loaded down to her possible draught of seven feet; but even if that be admitted, it does not follow that, when used in Napa Creek where she could normally be expected to go aground in some places, the fact of loading her to a draught of six feet would not be such an overloading as to make her unseaworthy for the particular work and voyage to which respondent exposed her. Again, if it were granted that this large lighter was not strong enough to withstand the strain of lying on the banks of Napa Creek, without any load on her,

it would follow that the act of respondent in taking her up this creek at all made her unseaworthy in those waters, and that, for that reason, the insurance company would be exonerated from the obligations of its policy.

Assuming that the overloading of the barge, or the act of sending the barge down Napa Creek under the circumstances of this case, constituted only negligence, and not wilful misconduct, the consequence of such negligence was the violation of the warranty of seaworthiness, and hence no recovery could be had on the policy. The principle that the insurer "is not exonerated by the negligence of the insured, or of his agents or others" (*C. C. Cal.*, Sec. 2629) applies only to a case where the policy is actually in force up to the time of the loss.

In another respect the barge, as used on this occasion, was unseaworthy. For the purpose of navigation she depended upon the launch. If stranding, in river navigation, is not unusual, the barge was unseaworthy unless provided with a tug capable of saving her after running aground.

D. *Because a policy insuring the owner of a vessel does not cover a loss caused by the negligence of a charterer or sub-charterer.*

Assuming that the policy "covered" the negligence of the insured, American-Hawaiian S. S. Co., it does not follow that it covers the negligence of

other parties to whom the steamship company chartered the lighter. The insurer may reasonably claim that it is willing to cover the negligence of the particular insured, but declines to take the chances of covering the negligence of unknown third parties. It would be plausible and, indeed, reasonable to take the position: I am willing to insure this lighter on the agreed waters, on account of this particular insured, a steamship company whose business does not send the lighter up into remote and winding creeks, but I would narrow the scope of the insurance, or charge a higher premium, if it were to cover the same lighter while controlled by a gravel company whose business takes her into hazardous localities. The insurance contract is between the insurance company and libelant herein. Granting that it would cover libelant, although the loss would not have occurred except for the negligence of libelant, or *its* master, crew or agents, it follows by no means that the liability under the policy would attach in a case where the loss would not have occurred except for the negligence of third parties or their agents.

E. *Because an agreement by insured with a third person, purporting to exempt such third person from liability for negligently destroying the subject-matter of the insurance, destroys the insurer's right of subrogation and therefore voids the insurance.*

Respondent's position is, and the lower Court decided, that, assuming that the lighter was negli-

gently destroyed by respondent, respondent was nevertheless exempt from liability by virtue of the contract. The positive defense is: Granting that I was negligent, still I am not liable. If this position is correct, and if such a contract existed between appellant and respondent, the natural effect was to make respondent indifferent as to the handling of the lighter; it could afford to use it negligently with impunity. The risk of loss or destruction of the lighter was increased by such an agreement. We suggest that an agreement changing and increasing this risk would be a fraud upon the insurance company, if made without the knowledge or consent of that company, and would be a defense in an action on the policy on that ground. But the same effect is produced by the consideration that, before the making of the contract, the insurance company had, under its policy, the valuable right of subrogation, so that, in case of loss by negligence, it could recoup the policy loss by action against the negligent actor. Would it be in consonance with principles of equity to empower the insured to deprive the insurer of so valuable a right by the one-sided act of the insured, without knowledge or consent of the insurer? When the contract of insurance was made (November 14, 1906), the parties to the contract must have contemplated the right of subrogation in case of loss. If the insured thereafter (on March 18, 1907) destroyed this right by a contract with respondent, the insurer was thereby deprived of an agreed right, and the policy was avoided.

Assuming that the loss under the policy was caused by the negligence of the Napa Gravel & Material Co., for which respondent is liable, respondent is the principal debtor, and the *insurance company is a mere surety*; hence, if the insured released the principal debtor, the insurer is also discharged to the full extent that he loses his right of subrogation.

May, Insurance, Sec. 454.

When the contract of insurance was made, it was agreed between insured and insurer that the insurer of the lighter, upon destruction of the same and payment of its value to libelant, would be subrogated to the claims of libelant against respondent. This being so, the libelant could not, by separate agreement with respondent, deprive the insurer of this right. Such an agreement would be *res inter alios acta*, and void as against the insurer. It would be a fraud upon the insurance company. Respondent would thereby, indirectly, protect itself against the consequences of its own negligence, and compel the insurer to indemnify it, without paying any premium. The result of such an agreement would be that the owner of the lighter gives up no right as owner against the charterer, but they two agree, behind the insurer's back, that the insurer shall have no right of subrogation against the charterer, but that the charterer shall have such a right against the insurer,—thus changing the law by their private agreement. The insurer would lose valuable rights, and assume an obligation to the charterer,

without having any say in the matter. Clearly such an arrangement would be contrary to law and justice.

ASSIGNMENT OF ERROR NO. 12.

The Court erred in taxing any costs of suit, and in particular proctors' fees, against libelant, in favor of Napa Gravel & Material Co. and American Bonding Company.

Appellant confidently expects that the decree of the lower Court will be reversed. All the equities are in favor of appellant. The principles of law involved are not simple enough to secure even the best of trial judges against error; in the pressure of the first trial it is not always possible for counsel to do full justice to a case which raises delicate questions of law. This is peculiarly the kind of a case in which the broad issues, and the legal principles governing the same, can be more appropriately presented and considered in the perspective in which the case appears before the appellate tribunal. It is safe to say that in every case where the equities are decisively on one side, the law is on the same side, although it may be difficult to demonstrate the coincidence. We believe that the principles of law presented to the Court will determine the issues in our favor.

If, however, the Court should disagree with us, we submit that the costs taxed against libelant and appellant in favor of Napa Gravel & Material Com-

pany, and American Bonding Company of Baltimore should be disallowed. These respondents were brought into the suit by the original respondent Bennett & Goodall, on April 14, 1909; the libel was filed on August 21, 1907. Hence, any costs incurred by the respondents so brought in should be taxed against the original respondent, and not against libellant.

This contention is supported by the case in the Southern District of New York, the *source* of the admiralty rules of this district:

The Charles Tiberghien, 148 Fed. 1016,

where, on facts precisely the same as those in the present case, it was held that such costs should not be taxed against the libellant. The Court said:

“The question is whether an unsuccessful libellant should be held responsible for the costs incidental to the bringing in of a third party by the claimant of a vessel. The practice has uniformly been in this district to hold the party who brings in a third one, liable for the latter’s costs where there is a dismissal of the petition. This is based on sound reason, inasmuch as the third party is brought in by and for the protection of the party invoking the remedy, under or by analogy to the 59th Rule. * * * I fail to see any reason to justify the charging of such expenses to the original libellant upon a dismissal of the libel and petition. If the libellant does not wish to run the risk of bringing the third party into the action and prefers to rely upon the original defendant, it does not seem just that he should be called upon to pay the expenses incurred when the third party is brought in for the protection of the second.”

It is to be noted that in that case, as in the present, the petition bringing in the other respondents was dismissed, as well as the libel.

The above language is quoted and approved in:

The Starke, 182 Fed. 498, at 500,

where the Court said:

“It seems to be settled that if the libelant had failed to establish its contention, and the proofs had exculpated the City of Milwaukee from blame, the costs of the City of Milwaukee would not have been taxable against libelant, but against the tug company which was instrumental in bringing the city into the litigation under the provisions of the 59th Rule. In *The Chas. Tiberghien* (D. C.), 148 Fed. 1016, the Court says:” (quoting as above).

“The principle seems to be that in such a case the costs will be taxed against the party who renders it necessary that such costs and expenses should be incurred. This seems to be an equitable principle.”

The items consisting of proctors' fees, taxed by said two respondents, are objected to on the further ground that it is the practice of this Court to allow only one proctor's fee to be taxed against libelant, under such circumstances, where the original respondent, for its own benefit, brings in additional parties.

The above contentions apply with peculiar force to respondent American Bonding Company of Baltimore, since it was a mere *surety* with which libelant could not possibly have anything to do—even under the 59th Admiralty Rule.

It is respectfully submitted that the decree of the District Court should be reversed, and that a mandate should issue to said Court to enter a decree in favor of libelant in accordance with the prayer of the libel.

LOUIS T. HENGSTLER,
Proctor for Libelant and Appellant.

No. 2230

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN-HAWAIIAN STEAMSHIP COMPANY

(a corporation),

Appellant,

vs.

BENNETT & GOODALL (a corporation), NAPA

GRAVEL & MATERIAL COMPANY (a corporation)

and AMERICAN BONDING COMPANY OF BALTIMORE

(a corporation),

Appellees.

and

BENNETT & GOODALL (a corporation),

Cross Appellant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (a cor-

poration), and NAPA GRAVEL & MATERIAL

COMPANY (a corporation), and AMERICAN

BONDING COMPANY OF BALTIMORE (a corpora-

tion),

Cross Appellees.

BRIEF OF BENNETT & GOODALL, APPELLEE, IN REPLY
AND ON CROSS APPEAL.

Statement of the Case.

The appellant opens its brief with an erroneous summary of the position taken by respondent Bennett & Goodall, and, as its attempted statement of the case is controverted, we present what we understand to be the true statement of the evidence adduced, the findings made, and the points which should engage the attention of this Court.

This appeal and its cross appeal arise from a libel for non-performance of a written charter agreeing under certain conditions to return two lighters, the one in question being known as lighter "Number One", belonging to appellant and chartered by it to respondent Bennett & Goodall.

The charter to Bennett & Goodall consists of a letter from libelant, accepted by Bennett & Goodall, which incorporated by reference the provisions of a third document, a policy of insurance. The pertinent portions of the charter are as follows:

"You (Bennett & Goodall) are to be responsible for these lighters and whatever gear is on them when you take them, and are to return them in as good order and condition as when you get them, reasonable wear and tear and *happenings covered by their present policies of insurance excepted*
* * * ,"

"* * * and if they are lost through any cause that will permit our underwriters to make a successful defense against paying the face of the policies, you are to be responsible.

"We (American-Hawaiian Company) are to keep the lighters insured, as they are now insured."

The charter thus has by apt language excepted from the obligation to return the lighter all risks covered by the policy against which the underwriters could not make a successful defense. The fact that the charter refers to the defenses of the insurer as well so the risks assumed by them and that the owner is to keep up the insurance, are matters of importance not touched on in our opponents' brief.

The American-Hawaiian Company had insured the lighter under a policy dated November 18, 1906, four months before the charter, and in force at the time of her loss. The "happenings covered by the present policies of insurance" referred to in the charter are shown from this policy to be the usual risks of the common English form. They appear at page 72 of the record to be:

"Adventures and perils * * * of the seas * * * barratry of the master and mariners, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage to said vessel or any part thereof."

With the consent of the libelant (Apostles p. 311), the lighter was sub-chartered to the Napa Gravel & Material Company, engaged in taking gravels from Napa Creek and, at the time of her striking the bank and total loss was being towed by a Mr. Crowley (not a party here) down Napa Creek from the gravel beds. The lighter, at the time of the loss, was out of the possession of Bennett & Goodall, with the permission of the libelant, and in the possession of the launchman of Crowley who was employed by

the Napa Gravel & Material Company. Bennett & Goodall was not in any sense the employer of the launchman, who was the servant of Mr. Crowley, an independent contractor (234), towing under a contract with the latter company.

The evidence is undisputed that Napa Creek is a tidal tributary of San Francisco Bay and hence an arm of the sea. The risk of her wreck there, is as much a peril of the sea as if in midocean.

Construing the charter in connection with this policy of insurance, the District Court held:

a. That Bennett & Goodall was not liable for not returning the lighter, if it was lost by a happening covered by the policy (and hence excepted from the charter obligation to return her), such as a peril of the sea, even if caused by negligent navigation (not being a defense that underwriters could successfully urge) (351).

b. That the lighter was in fact lost by such a happening, to wit, striking the bank on Napa Creek (351).

c. That the lighter had been subchartered to the Napa Gravel & Material Company with the consent of the American-Hawaiian Company, who held it at the time of the disaster (351).

d. That the Napa Gravel and Material Company hired a gasoline launch of one, Crowley, to tow the lighter up and down the stream, and while in charge of this towboat, the lighter went ashore and was wrecked (346).

e. That the lighter was not lost by reason of any wilful misconduct or neglect or wilful act of any kind by the libelant or any of the respondents (351).

All the facts in the above findings are admitted, save that the evidence does not support the finding that the loss was without the *wilful* negligence of Crowley's launchman or the Napa Gravel & Material Company. The Court held it immaterial whether the launchman navigated negligently, and made no finding in that regard, save that *if* his act was negligent it was not *wilful* negligence. Bennett & Goodall deny that there was any negligence whatsoever. The American-Hawaiian Company asserts that the Crowley launchman was not only negligent but wilfully negligent.

In its opening statement, at page 3 of its brief, appellant attempts to force us into the position of relying on the charter to exempt us from *our own* negligence and also that of *our* agents, and claims that such a construction of the contract would be *contra bonos mores*. We deal with this contention in another section, merely pointing out at this time that under the undisputed facts, not only did Bennett & Goodall themselves have nothing to do with the handling of the launch which towed the lighter at the time of the loss, but no agent or employee of Bennett & Goodall. If there be negligence shown, the only question of contractual morality is whether a charterer of a lighter, who has subchartered with the consent of the owner, may make a contract with the owner whereby he frees himself from liability for the negligence of a launch-

man not his employee who is in possession of the lighter and towing it under an independent contract with the subcharterer.

We expect not only to support these findings but to establish the absence of any negligence whatsoever. Our brief will endeavor to show:

I. The evidence supports the finding of the lower Court that there was a loss by peril of the sea not caused by wilful neglect or misconduct on the part of Crowley's launchman, employed by the Napa Gravel Company to tow the lighter; and in addition not only does not sustain libellant's burden of proof as to negligence but affirmatively shows no negligence.

II. The loss was within the exception of the charter, since the striking on the shore and wreck was a "happening" covered by the policy of insurance and the "underwriters could not make a successful defense" even if there were negligent navigation which contributed to the striking and wreck.

III. A charter provision is valid which, as here, clearly and unequivocally excepts a peril of the sea even when contributed to by negligent navigation, or by any cause against which the underwriters could not successfully defend.

IV. The charter of the barge is not a towing contract.

V. While the subcharter and the subcharterer's engagement of an independent contractor to tow do not make the charter to Bennett & Goodall any the less a

bailment, nevertheless the freedom from complicity of Bennett & Goodall's agents in the loss removes any ground for objecting that an interpretation excepting negligence is *contra bonos mores*.

VI. Even if the wreck had been caused by the negligence of an employee of the charterer, it was no more wrongful for the owner and charterer to contract that the owner should look solely to the insurance company for its compensation than that the owner should make the admittedly proper insurance contract whereby the loss falls on the insurance company, even if caused by the negligence of the owner's employee.

VII. The non-production of witnesses. *if precedent raises an inference against charterer.*

VIII. CROSS APPEAL. If the charterer, Bennett & Goodall, is liable, it should have a decree against the Napa Gravel & Material Company and its bondsman the American Bonding Company.

I.

The evidence supports the finding of the lower Court that there was a loss by peril of the sea not caused by wilful neglect or misconduct on the part of Crowley's launch man, employed by the Napa Gravel Company to tow the lighter; and in addition not only does not sustain libellant's burden of proof as to negligence but affirmatively shows no negligence.

The evidence on the question of the propriety of towing Lighter No. 1 down Napa Creek at the time

in question, consists of the testimony of ten experts, all launch, tug or steamboat men, more or less familiar with those waters. All of these expert witnesses testified *circa voce* before the Court, and it is upon this testimony that the finding in question rests.

The appellant seems to assume that this Court will treat the appeal as a trial *de novo*, disregarding the finding of the lower Court, but the contrary has repeatedly been held, both here and in other tribunals. Even where the findings are but those of a Commissioner of the District Court, the Appellate Courts will not examine the facts further than to determine that there is evidence *to support* the findings, ignoring the question whether the preponderance might not have been the other way.

“The question is not what the conclusion of this Court should be on the testimony but whether the commissioner’s report, sustained as it was, after full argument, by the District Court, was so clearly erroneous as to warrant us in setting it aside. The powers conferred upon a commissioner in admiralty causes are analogous to those of masters in chancery and his findings upon questions of fact depending upon conflicting testimony or upon the credibility of witnesses should not be disturbed unless clearly erroneous.”

La Burgoyne (C. C. A.), 144 Fed. 781 at 783.

See also

Coastwise Transportation Co. v. Baltimore Steam Packet Co., 148 Fed. 837 (C. C. A.).

In the case of *The Captain Weber*, tried before the District Court, Judge Ross said, relying on many cases there cited:

“The evidence was given in open court, and is substantially conflicting. The well settled rule in such cases is that the decision of the district judge, who has had the opportunity of seeing the witnesses, hearing them testify, and judging of their credibility, will not be reversed unless clearly against the weight of evidence. *The Allejandro*, 6 C. C. A. 54, 57; 56 Fed. 621; *The Sampson*, 4 Blatchf. 28, Fed. Cas. No. 12,279; *The Sunswick*, 5 Blatchf. 280, Fed. Cas. No. 13,625; *The Thomas Melville*, 37 Fed. 271; *The Albany*, 48 Fed. 565; *The Warrior*, 4 C. C. A. 498, 54 Fed. 534; *Duncan v. The Gov. Francis T. Nicholls*, 44 Fed. 302; *Taylor v. Harwood*, Taney, 446, Fed. Cas. No. 13,794.”

The Capt. Weber, 89 Fed. 957 at 958.

We will therefore simply review and cite the evidence supporting the following findings of the Court:

“The Napa Gravel & Material Company thereafter hired a gasoline launch of one, Crowley, to tow this barge up and down the stream, and while in charge of this tow boat the lighter went ashore, and was wrecked.”

Record, page 346.

“The said lighter was lost through a cause that would not permit and did not permit the said Sea Insurance Company to make a successful defense against the payment of the said policy, the said cause being a happening to the said lighter, to wit, a peril of the sea, to wit, the wrecking of the said vessel by striking upon the bank of Napa Creek, whereby she was caused to collapse and be utterly destroyed.”

Record, page 351.

“If there was negligence of any kind it was simply ordinary negligence, and was not such as to

exempt the insurance company from liability under their policy.”

Record, page 348.

“Said lighter was not lost by reason of any wilful misconduct or neglect or wilful act of any kind by libelant or any of the respondents.”

Record, pages 351, 352.

It is our contention that the evidence clearly shows n negligence at all, and that this Court should make such a finding if it should think it necessary to look beyond the decision of the lower Court. In this connection it should be noted that once the charterer has shown a loss from an excepted peril such as a peril of the sea, the burden of *proof* shifts to the owner to show that it was caused by negligence.

Tyler v. De Fries, 78 U. S. 129;

Clark v. Bramwell, 12 How. 272.

Mr. Theodore A. Bell of the Napa Gravel & Material Company, after enquiring as to the proper person to consult with, engaged the launch from Mr. Thomas Crowley (Record 219). Mr. Crowley had been in the business for fifteen years and was its founder in this port and owned twenty-five launches, twenty lighters and several other vessels, all towed by gasoline and confined to the San Francisco Bay and the tributaries thereof (Record 77 and 78). Mr. Bell explained to Mr. Crowley what the gravel company was going to do with the barges and stated that they wanted “a proper launch” and “skilled men to handle them on the upper (Napa) river, to take them down to meet our tug boat

on the bay, from Vallejo up to the wide stretches and deep water of the river" (Record 217). "We did not select any particular launch, and we did not select any particular men. We told him what we wanted, the business we were in, what barges we had, and asked him to supply the necessary launch and men to carry out our business for us, our operations."

Mr. Crowley selected the launch "Pickett" a new boat, built after the fire of 1906, of fifty horse power and three cylinder standard engine, not a year old. The "Pickett" is still working (5 years later) towing barges on the Sacramento and San Joaquin Rivers (Record 79 and 80). This launch, says Mr. Crowley, could handle the barge in any part of Napa Creek (Record 85). It had handled the "Energy" there, a barge much larger than libellant's boat (Record 99 and 100).

He selected Lattimore to run the launch, a man who had been with them for several years and whom he considered good, adequate, and capable (Record 80). He had been accustomed to send him "all over everywhere" including Napa Creek, with which he was familiar (Record 82). Lattimore had made three to five trips with this or her sister lighter prior to the one in question without incident.

The testimony is uncontradicted that Napa River is like all other tidal tributaries of the bay and that it is not so difficult as many others used for night and day barge transportation.

The practice in handling these gravels for delivery around the bay is to fill the lighters by daylight and tow

them down the creek at night (Record 110, 111). Our opponent's witness Hatt, a steamboat man navigating Napa River says:

“Q. Did you hear the testimony here, to the effect that it was customary to handle these barges at night, the loading being done in the daytime, and that they were taken out at night on convenient tides? Is that correct? A. Yes, sir.

Q. That is the usual method on that creek?

A. Whenever they are loaded.

Q. Regardless of whether it is day or night or light or dark. The tide is the only thing that deters them?

A. Yes, sir.”

Hatt, Record, pages 249, 250.

The deposition of Lattimore shows that on the night in question she had a comparatively light load of gravel bringing her draft to but six feet (337). This meant that she had but 500 short tons or 200 tons less than her full load which would have brought her to 8 feet draft (Young, 307). Five hundred short tons equal 400 cubic yards (307) which was the amount shown by the records of the company (Bell, 222, 223).

Lattimore's deposition was taken by the libelant several years after the disaster and gives a clear account of the main features though not as to all the details. He places his time of departure as some time around ten o'clock, on the flood or incoming tide. He was not certain how long before the turn of the tide (324).

The high tide in upper Napa Creek is about three hours later than at Golden Gate (Piggott, 201). The tide tables show that it was high tide at Golden Gate that night at 11:10 o'clock (205) and hence in upper Napa Creek at about two o'clock. Lattimore places the time

of the wreck at about two o'clock in the morning or just about high tide. The ebb tide is sluggish for the first three hours of its run when it may reach a maximum flow of one and a half to one and three quarter miles (Fisher, Record 313, 314).

It is thus apparent that while the lighter and launch reached place of the wreck at two o'clock the most favorable moment for passing, i. e. high tide, they would have had sluggish water for passing around the bend at any time in the next three hours.

Captain Fisher's testimony (before Judge Bean) in this connection was as follows:

"Q. The first three hours of the ebb tide is rather sluggish there, isn't it? A. Yes.

Q. Now, suppose you are loading a mile below the Suscol wharf and it is high tide at the head at 10:38, what time would you consider the proper time to leave to come down that creek with such a lighter as lighter 'Number One' and with the 'Pickett'?

A. Well, before the rocks was taken out or since?

Q. Before the rock was taken out.

A. I would leave at high water at the head.

Q. That would be somewhere around 10:38? A. Yes.

Q. You would have to buck some tide, wouldn't you, going out? A. Yes.

Q. The first portion of your trip would be quite slow, wouldn't it? A. Yes.

Q. You would gradually after the tide passed go more rapidly? A. Yes.

Q. Might take a couple of hours to go down if there was a heavy tide to buck?

A. If there was a very heavy tide.

Mr. HENGSTLER. To go down how far?

Mr. DENMAN. To go down to the bend?

A. Well, I don't think it would take hardly that long, not down to the bend from below the Asylum wharf, except you

are running at very slow speed, very carefully coming around the bends.

Mr. DENMAN. If you were very careful coming around the bend it might take a couple of hours?

A. Yes, take a couple of hours.

Cross-Examination.

Mr. HENGSTLER. Q. You admit that it is quite a great care to get around those bends, do you not?

A. Well, yes, we always watch for the bends when we come to them.

Q. By saying then that they are not dangerous, you mean that they are not dangerous for a man of your experience and skill?

A. For a man that has had experience in the creeks why, we don't slow up at all coming to the bends, not since they took the Rocky Reach out of there.

Q. Don't slow up at all since they have the rocks out of there? A. No.

Q. It does not make any difference whether it is light or dark when you pass through there?

A. Well, it is easier to pass through, as far as day and night is concerned, it is easier to pass through in the daytime; you can see farther ahead. But we don't find any trouble in coming through after dark.

Q. But it is more dangerous, is it not, in the dark; in a dark night than it would be in the daytime or on a clear night?

A. Well, I cannot say much about that part of it; you can't see as far ahead, that is the only difference.

Q. You would not consider it dangerous in the darkest night?

A. No, we come down at any time; it don't make any difference how dark it is as long as there is no fog.

Q. Fog is the only thing that makes it dangerous? A. Yes.

Fisher, Record, pages 314-316.

Captain Piggott, who sailed a small steamer on Napa Creek and all the other small tributaries of the bay, also gave the same testimony before Judge Bean. It is as follows:

E. S. PIGGOTT,

called for the respondent, sworn.

Mr. DENMAN. Q. What is your occupation?

A. Master mariner.

Q. How long have you been a master mariner?

A. Since 1883.

Q. What class of vessels have you been on?

A. Both sail and steam.

Q. Are you in command of a ship now? A. I am.

Q. What is it? A. A river steamer.

Q. Are you familiar with the waters of Napa Creek?

A. Yes, sir.

Q. Been up and down that creek on many occasions?

A. About four years steady.

Q. What can you say as to the navigability of the creek, is it difficult or easy of navigation?

A. I don't consider it very difficult.

Q. How does it compare with the other creeks around the bay? A. I don't see much difference.

Mr. HENGSTLER. I object to it. It does not appear that this witness knows anything about other parts of the bay and Napa Creek.

Mr. DENMAN. Q. How long have you been sailing on the waters of the bay, Captain?

A. The waters of the bay of San Francisco and tributaries? Since 1902.

Q. That means practically all the tributaries of the bay?

A. Pretty much all the tributaries.

Q. Constantly sailing there? A. Yes, sir.

Q. You have a small river steamer that you handle?

A. Yes, sir.

Q. And it can make practically all the tributaries of the bay? A. Yes, sir.

Q. Been up Napa Creek? A. Yes, sir.

Q. Sonoma Creek? A. Yes, sir.

Q. Petaluma Creek? A. Yes, sir.

Q. Been to San Jose? A. Yes, sir.

Q. What creek do you have to go through to go to San Jose? A. You go by Alviso.

Q. How does that creek compare with Napa Creek?

A. I think—I am not very familiar with Alviso Creek but I think Napa Creek is much easier navigated than is Alviso Creek.

Q. You have sailed in and out amongst the islands of the river, delta islands? A. Yes, sir.

Q. Are you familiar with those narrow channels there?

A. Yes, sir.

Q. How do they compare with Napa Creek for navigability?

Mr. HENGSTLER. I object to the comparison between different creeks because it will lead into endless comparison and not one of them can possibly be like another one. There are always points of distinction, which I will be able to bring out.

Mr. DENMAN. I want to show here there is a very large traffic on these winding tidal creeks about the bay, and Napa Creek presents no special features of difficulty.

The COURT. Ask the question.

Mr. DENMAN. That is a fact, Captain, is it not?

A. That is a fact.

Q. Are you familiar with the strip of Napa Creek known as Horseshoe Bend? A. Yes, sir.

Q. Do you know where it is? A. Yes, sir.

Q. Have you sailed through there a number of times?

A. Yes, sir.

Q. Now, what is the tidal difference between Golden Gate and the upper portion of Napa Creek?

A. I should say about three hours, somewhere thereabouts.

Q. That is the calculation you have to make when you are going in?

A. The calculation of the setting tide, departing from Napa for us to get in high water coming down, we figure about three hours.

Q. So that if the high water at the Golden Gate was at 10:38 o'clock the high tide in the upper reach of Napa Creek would be 1:38? A. About that.

Q. Suppose it was high tide in the upper reach of Napa Creek at 1:38, what would you say about the advisability of passing down through the Horseshoe Bend with a barge in tow between one and 2 o'clock on that morning?

A. The advisability of passing down between one and 2 o'clock?

Q. *Yes, at that time. Suppose now, it is high tide in the upper reach of the creek at 1:38 and you are to take your barge through between one and 2 o'clock, what would you say as to that being a good or bad time of the tide to take it through.*

A. *I would think that was a very practicable time to take it through.*

Q. *That is a proper time to take it through, is it not?*

A. *Yes, sir."*

Pigott, Record 199-202.

Captain Hatt and Pilot Bell, both libelant's witnesses, state that the start should be made about two hours before high tide (Record 251, 258). The gasoline men are all agreed that the night time is usual for such towing (Fisher, pages 110-111; Piggott, page 213; Johnson, pages 139-140).

The distinction between wilfully and properly entering into navigation which may be more dangerous at one time than another is nowhere better brought out than in the two cases of

Standard Marine Ins. Co. v. Nome Beach etc.

Co., 167 Fed. 119;

Same case, 133 id. 636.

In the first of these it was held to be a wilful act to enter the ice pack outside Nome in an attempt to force a passage up to the town and obtain the benefit of the first market there after their winter's isolation (133 Fed. 636). A new trial was granted and the insured again recovered. The Court of Appeals sustained the verdict, using the following language:

"The evidence adduced on behalf of the defendant in error on the second trial differed from that which was introduced on the first trial, in that tes-

timony of witnesses was taken to establish the fact that it was usual and customary with vessels on the voyage to Nome, when reaching floating ice, to enter the same, and proceed through it by selecting leads or channels and following from the one opening to another, thus making their way forward by degrees."

Standard Marine Ins. Co. v. Nome Beach, etc., Co., 167 Fed. 119 at 120.

It is apparent that as far as concerns the voyage down the river at the time and tide in question, Judge Bean based his finding that there was no wilful neglect or recklessness, on the testimony of all these witnesses whom he heard. It should not be disturbed.

The evidence as to the power of the launch equally supports Judge Bean's findings as to a want of recklessness or wilful negligence. All the captains of launches agree that she had ample power to handle the barge in these sluggish waters. Mr. Crowley, the man of the largest experience, testified as one having seen that the launch was adequate for the work, and likewise Lattimore who had her in charge.

Mr. Fisher testified before Judge Bean that he had been towing on the river with a similar gasoline launch of the same horse power similar barges for three years after a nine years' experience in operating gasoline tow boats (Record 106). The engine of his boat being, if any different, not as powerful as that of the "Pickett" (Record 107). He towed up and down, *always at night*, reserving the day for loading and discharging (Record 110 and 111), with no assistant (Record 112). For the first three

months he operated in upper Napa Creek and then for two and one-half years has towed barges, loaded with gravel, varying in size from twenty-eight by eighty to 37 by 130 (larger than lost barge) with his gasoline 50 h. p. tug, not only down the Napa River but across the Bay of San Francisco to and up the 3rd street channel exposed to storm, wind, tide and current far greater naturally than encountered in the protected river course (Record 113). Further, with this same 50 horse power launch he handled dredgers 50x110 and more unwieldy than the barge (Record 134).

It is easier to control the lighter in bends with small boat of light draft than with larger tug of heavier draft and this is why they are used (Record 112). It is mostly gasoline launches which are handling small barges on Napa Creek (Record 112-113) only 2 steam tugs operating there and half a dozen gasoline boats (Record 113).

Captain Johansen testified before Judge Bean that after six or seven years handling gasoline boats he operates a 50 h. p. launch in Napa Creek day and night (Record 139 and 140) having gone up the creek two hundred times (Record 141) and having many times seen loaded barges coming and going there, being towed by gasoline launches (Record 150). Capt. Figgott testified *viva voce* that he had been a master mariner since 1883 and was now commanding a river steamer (Record 199) and knows Napa Creek. He agrees with Capts. Fisher, Johansen and Bennett that the launch could handle the barge (Record 203). He had been master of the

“Phoenix” and “St. Helena” for four years, and himself with the “St. Helena” towed a barge 220x40 partially loaded down the creek, after a gasoline launch had taken her up, and considers the smaller boat better than the larger for the work because it can turn at any angle and snub while the larger and heavier boat has to keep the middle of the stream (Record 211). He operated at night equally as well as by day (Record 213).

Captain Bennett, an interested party, it is true, but of vast experience, having been a master mariner since 1883 and handling shipping properties of all kinds for twelve years as director of operations and marine superintendent of Pacific Coast Steamship Company (Record 163, 165, 188) had sounded the waters in question, watched the navigation there for a week and had 7 months’ experience in the business of towing by gasoline launches in Napa Creek covering the period of the accident (Record 180, 181), and convinced himself of the entire propriety of towing Lighter No. 1 with a 50 horse power launch. He stated that the barge “Energy” 200 tons larger than libellant’s barge (Record 166) and being 159 feet long 12 feet deep and drawing 10 feet of water was successfully towed by the “Pickett” and similar launches on the Napa Creek (Record 166 and 174).

We thus see that the evidence of *all* the persons experienced in handling *gasoline launches* agrees that the launch in question was a proper tug for the lighter, that the voyage was commenced at a proper time and on a proper tide.

The only evidence against these men was that of certain steamboat men and stevedores called as experts all testifying before the Court.

Mr. Hatt, libelant's first witness, had never towed with a gasoline boat (Record 238 and 248), and is not a licensed navigator (Record 240).

H. G. Bell, libelant's second witness, never had any experience with and never handled a gasoline engine in towing in his life (Record 257).

L. H. Fox, libelant's third witness, says "I have had nothing to do with gasoline launches to speak of" and yet he himself towed down on Napa Creek on an ebb tide a barge 220 feet long as against Lighter No. 1 of 120 feet, loaded with one hundred horses and 40 odd wagons and so forth (Record 226) and says (267) you are more likely to find snags in Napa Creek than in Petaluma Creek. He never handled gasoline launches in towing (Record 267) and has many times encountered snags in the creek (Record 270) and on page 271 plainly indicates his prejudice against gasoline operators by stating he does not compare one with the other as you can hire "those fellows" for \$100 per month while the poorest pilot on the front gets \$125 and a captain \$150.

F. H. Cruthers, libelant's fourth witness, ran in Napa Creek 45 years ago and made a couple of trips since (Record 276). Never handled a gasoline launch for towing and never wants to and never towed to Napa Creek (Record 279) and on page 281 says "Actually I am prejudiced against them" (gasoline launches).

Captain Pinkham, libelant's fifth witness, frankly states, on page 298, that the only class of navigation he ever had to deal with was steam stern wheel navigation.

H. R. Young, libelant's sixth witness, is a stevedore, and the only thing he knows of towing "is ordering tow boats for our particular line of work around the city front" (Record 302), and in the bay where the tide runs as high as seven knots (Record 304). He says that there would be no trouble in handling these lighters in a two knot current. As we have seen the maximum on Napa Creek was less than this.

It is apparent that even if this were a trial *de novo* the testimony of libelant's witnesses, where adverse, would have to be rejected as against the practical experience of the disinterested launchmen, who alone knew of the capacities of gasoline launches for towage.

We now come to consider the actual occurrences of the wreck.

Lattimore says that the lighter pulled very slowly at first after he left the gravel beds and evidently he was for a while "bucking" the last of the flood tide. Up to the time of the disaster the launch had handled the lighter around the many bends and turns of the creek without difficulty. A short distance above the bend in question is a rocky reef reaching out from the shore on the port side of the launch. The testimony is uncontradicted that they had successfully passed this reef by several hundred feet before the accident occurred (189). The lighter was fastened to the launch

by two lines in the form of a bridle leading to her forward corners (326), the customary method of towing such vessels.

After passing the reef and when just about at the bend, the lighter took a sheer to starboard and when Lattimore attempted to correct it, she took a sheer to port and ran ashore on her port side at a point *around* the bend (189). The launch was pulled ashore with the lighter but they did not collide (326).

Lattimore says that something hit the propeller of his launch, breaking off a blade and disabling his rudder and steering gear. Whether this or an eddy caused the sheering of the lighter, he seems uncertain. In any event, he says that if the snag had not disabled his launch, he would have been able to save the barge, either by preventing her from actually touching the bank or by hauling her off before the tide had fallen and made her hard aground. His testimony is as follows:

“Q. Now, how far did you get with your tow before anything of any note occurred?

A. To that bend that I have understood to be called Horse-shoe Bend.

Q. What occurred at that bend?

A. The barge took a sheer starboard and I made an effort to pull her away from the starboard bank; whether it was an eddy, or what it was, she took a sheer to port. When I got the boat around and I got her clear of the starboard bank, I straightened her up, and whether it was an eddy or what it was, I don't know, she took a sheer to port and she went ashore and pulled the barge with her.

Q. What effort did you make to keep her from the port shore?

A. I made all the efforts that I could at that time. There was something, whether it struck the wheel at that time I could not tell.

Q. You mean whether the barge struck the wheel or not?

A. No, sir, not the barge; whatever it was; it was a dark night and I could not see what it was. *The way the barge took her sheer, it might have been the stump of a pile hit the wheel, the propeller.*

Lattimore, pp. 325, 326.

“Q. What did you find with reference to the condition of your launch after you had succeeded in getting her back in the creek?

A. *I found that the rudder was out of condition and one of the blades of the propeller was gone.*

Q. What, if anything, did you do in order to get the barge afloat?

A. I could not do very much of anything, being that the tide was falling pretty quick.”

Lattimore, p. 329.

“Q. You say her rudder was out of commission, didn't you?

A. Yes, sir.

Q. Would it be possible to navigate her without a rudder, or with the rudder out of commission as it then was?

A. Running light; yes.

Q. What do you mean by running light, running without the tow? A. Without anything.

Q. Would it have been safe to go down the creek with your launch in that condition? A. It would not be very safe.

Q. And was not that the reason why you moored, because you felt that it was not safe? A. Well, yes, I did.

Q. That was your reason for mooring alongside?

A. Yes, sir, more or less.

Q. What other reason did you have?

A. That was the idea my mooring alongside. It was a very dark night, and my rudder was out of commission, and naturally that was all I could do, to moor alongside the barge.

Q. What happened to the barge after that, as long as you were there?

A. She fell to pieces.

Q. About what time was that, Captain?

A. It was in the morning about seven o'clock, something like that."

Lattimore, p. 330.

"Q. Suppose the accident had not happened, did anything happen to the tow besides breaking or injuring her rudder?

A. Yes, sir, the wheel was broke; the propeller was broke.

Mr. HENGSTLER. You mean to the tug?

Mr. COOPER. Yes, to the tug.

Q. *If the propeller-wheel had not been broken and these injuries had not happened to you at this time, would she have gone ashore?* A. *I don't think she would have gone ashore.*

Q. *Could you have pulled the barge off?* A. Yes, sir.

Q. *Without any trouble, as far as you know?*

A. *As far as my navigation is concerned, I think I could."*

Lattimore, pp. 338, 339.

"Q. But you remember that you tried, didn't you? Did you or not try to pull her off?

A. If I am not mistaken, I did; I am not sure now.

Q. You tried to save the barge? A. Certainly I did.

Q. You did everything in your power that was suggested at that time to save her? A. Yes, sir."

Lattimore, pp. 339, 340.

The lighter was wrecked at an unfortunate place where she lay at a very considerable angle (309). When relieved of the support of the waters about her, she collapsed and was totally destroyed. This occurred about seven o'clock that morning, that is at the first succeeding low tide.

The breaking down of the barge under these conditions was no sign of overloading. Hatt, our opponent's witness, a steamboat man who was very familiar with these waters testified:

"MR. HENGSTLER. Q. Would you say that in your opinion she must have been overloaded?

A. I don't know whether she was overloaded; I would say because she had a load; when she would go up on the bank and the tide would fall away from her she would naturally break in two if she had a load in her, and our boats would have done the same thing if they had been in the same position."

Hatt, p. 243.

There is no contradiction to the testimony that Napa River has just such snags as Lattimore claims disabled his propeller and steering gear. Whether a floating pile or a tree stump undermined by the tidal flow, Lattimore could not tell, but the witnesses for both sides agreed that snags are among the perils of navigation there.

Our opponent's witness, Captain Fox, says:

"Q. You are more likely to find snags in Napa Creek than Petaluma Creek? A. Yes, sir.

Q. Snags are one of the perils of the creek? A. Yes, sir.

Q. The other perils of the creek are these sharp bends that you have to face? A. Yes, sir.

Q. So that when one man takes a barge down these creeks he has to have those perils in mind and watch for them. It is his skill against those perils? A. Yes, sir.

Q. That is true of the Napa Creek navigation?

A. Yes, sir."

* * * * *

"Q. Had you ever had to avoid a snag in the creek?

A. Yes, sir.

Q. Many a time?

A. Yes, sir; a snag don't have to be in my estimation at the bottom of a creek. An old hulk of a tree sticking out alongside of a bank that will probe you in the side is a snag.

Q. Or a floating pile or stump? A. Yes, sir.

Q. Or a timber that has fallen off into the bay?

A. Yes, sir.

Q. All those things endanger your stern-wheel or propeller? A. Yes, sir."

Fox, pp. 267, 270.

The testimony in the case thus clearly supports the finding of the Court that the vessel was lost by perils of Napa Creek, an arm of the sea, namely striking on a snag and stranding, and that there was no wilful negligence or misconduct on the part of Lattimore, who was in full charge of navigating the launch and lighter. We further submit that there is no showing of even "ordinary negligence" in navigation, and that the misfortune which disabled the launch's propeller came from one of the unavoidable perils of this customary night travel on these tidal tributaries of the Bay of San Francisco.

In our next section we will show that this loss was by perils covered by the policy of insurance, whether or not there was negligent navigation.

II.

The loss was within the exception of the charter, since the striking on the shore and wreck was a "happening" covered by the policy of insurance and the "underwriters could not make a successful defense" even if there were negligent navigation which contributed to the striking and wreck.

The pertinent portions of the charter are:

"You are to be responsible for these lighters and whatever gear is on them when you take them, and are to return them in as good order and condition as when you get them, reasonable wear and tear and

happenings covered by their present policies of insurance excepted."

" * * and if they are lost through any cause that will permit our underwriters to make a successful defense against paying the face of the policies, you are to be responsible.*

"We are to keep the lighters insured, as they are now insured."

The noticeable ~~first~~ thing about these provisions of the charter is that they were written by the libelant itself and are not part of a cojoint document. The libelant is presumed to be able to frame an instrument to protect itself and the letter is subject to the rule of interpretation that where an instrument is prepared and executed solely by one party and accepted by another in a separate letter its doubtful provisions are to be construed in favor of the other party.

Van Jandt v. Hanover Bank (C. C. A.), 149 Fed. 127;

Wilson v. Cooper, 95 Fed. 625;

Noonan v. Bradley, 9 Wall. 394.

However we submit that there cannot be any doubt as to what the parties meant. It is a clear common-sense business proposition. It says "we have insurance on these lighters which protects us from certain accident. You take them and use them just as carefully as we ourselves would and you shall have the benefit of this insurance in case of loss. We will keep the vessels insured as they now are, and you must not do anything that will permit our underwriters to make a successful defense against claims arising under the policies."

Even the common carrier, whose stipulations against negligence are much more strictly construed than those of the charterer, may agree that he shall have the benefit of any insurance placed on the goods by the shipper, although the loss is due to his (the carrier's) negligence.

Phoenix Insurance Co. v. Erie Trans. Co., 117 U. S. 312;

Wager v. Providence Ins. Co., 150 U. S. 97.

It certainly would be a shock to any business man to realize that his plain business letter could support the pages of mediaeval casuistry which our opponent's brief evolves out of these few lines. The District Judges took it at its face value, and found no reason why, if the appellant could insure itself against certain risks, it could not, in effect, transfer the benefit of the insurance as to the same risks to its charterer.

Both Judge De Haven and Judge Bean passed directly on the charter, the former on the exceptions and the latter at the trial. Judge De Haven's ruling was as follows:

"The burden is upon the respondent to show that said lighter was lost by some peril *covered by* the policy of insurance referred to in the contract."

Record, page 25.

It will be here noticed that the Court does not say some peril *mentioned in* the policy of insurance, but some peril "*covered by*" that policy. It treats and construes that document as a separate document.

When we consider the words "through any cause that will permit our underwriters to make a successful defense", we are driven to the irresistible conclusion that the causes the parties had in mind were those which would be urged by the insurer in a suit against it on the policy. The charter set forth in the letter thus excepts certain risks, both by negation and affirmation. It refers to the risks expressly covered by the policy and says that as to these the charterer shall not be liable. It refers to the defenses which the insurer can successfully raise, and says that as to these the charterer *shall be liable*. The only question of interpretation left is as to whether the policy "covers" a striking and wreck in the tidal waters of the bay's tributaries, and, if it does cover it, whether there was anything in connection with the striking which "would permit the underwriters to make a successful defense".

Clearly no more apt and appropriate language could be used to include the causes on which the insurance company might predicate a defense and to exclude from the charter those causes for which the insurance was liable. Equally clearly it follows that, if negligent navigation is not a defense to a loss from striking and wreck, the charter does not make the charterer liable for such a loss.

Judge Bean's interpretation given as his conclusion independent of Judge De Haven is as follows:

"Without discussing the question at length, or referring to the authorities at all it seems to me clear in view of these provisions in the contract, that it was the intention of the parties to exempt the charterers from liability for any loss caused

by a happening covered by the policy of insurance, or, in other words, that they should be liable only for a loss through some cause due to their fault which would prevent the owner from recovering from the insurance company. There is no evidence that the loss of the lighter was due to the fraud or design of the respondents or their agents, or employees. Mere negligence of those in charge thereof, would not defeat a recovery on an insurance policy like the one in question.

If, therefore, it is conceded that the respondents have not shown by a preponderance of its evidence that the loss was not due to the fault it nevertheless was a peril covered by the insurance and exempted from the contract. So, it is unnecessary for the Court to determine in that view of the law whether there was negligence or not, because if there was negligence of any kind it was simply ordinary negligence, and was not such as to exempt the insurance company from liability under their policy."

Record, pages 347 and 348.

The question then presents itself whether the District Court was correct in holding that negligent navigation on Lattimore's part contributing to the wreck would not defeat the recovery on the policy even if he had been Bennett & Goodall's agent instead of the employee of the independent contractor engaged by a sub-charterer.

On this point all the authorities have been long agreed. Speaking for the Supreme Court of the United States Justice Gray says:

"Collision or stranding is doubtless a peril of the seas; and a policy of insurance against perils of the seas covers a loss by stranding or collision, although arising from the negligence of the mas-

ter or the crew, because the assurer assumes to indemnify the assured against losses by particular perils, and the assured does not warrant that his servants will use due care to avoid them."

Liverpool etc. Co. vs. Insurance Co., 129 U. S. 397 at 428.

In *Arent Mut. Ins. Co. v. Adams*, the Supreme Court upheld the following instruction:

"The mere fault or negligence of the captain of the vessel by which the 'Alice' was drifted into the current and drawn over the falls, will not constitute a defense for the Company, unless the jury be satisfied that the captain acted fraudulently or willfully, with design in so doing."

Orient Mut. Ins. Co. v. Adams, 123 U. S. 67 at 72 et seq.

"Grounding whether arising from stress of weather, ignorance of the locality, blunder or stupidity, or desire to avoid some approaching vessel, or other danger; in short for any reason out of the ordinary course of things in the voyage is considered one of the perils of the sea."

Richards on Insurance, p. 603, No. 427.

Cal. Civil Code, Section 2629 provides that:

"An insurer is not liable for the wilful act of the insured; but he is not exonerated by the negligence of the insured, or his agent or others."

"The general rule is that where the immediate cause of a loss is a peril of the sea insured against, the underwriters are liable notwithstanding such loss would not have occurred except for the negligence of the insured or that of the master, crew or other agents or servants."

26 "*Cyc.*", 660.

Citing over a hundred cases of all Courts.

In view of the absence of wilfulness, so found by the lower Court, there can be no question that the loss of the lighter, whether by striking the snag or by the stranding from which the crippled launch was unable to pull her, was one "covered by her present policy of insurance "upon which the underwriters could not make a successful defense".

Appellant's brief contends that "the insurance company may well have made the defense that, while it insured the barge while 'employed in navigating harbor of San Francisco and tributaries, including Sacramento River', the insurance was against perils of the seas, and not the peculiar perils incident to a river, and more particularly the upper portions of a winding river". That is to say that the company could take its premium for a marine policy covering a tidal creek like Napa River, which is an arm of the sea, and then contend that it was not liable for any accident of navigation under the "perils of the sea clause" because the tidal creek was named a "river". It is a fair inquiry to ask, "What in Heaven's name did they insure against? Was the appellant expecting pirates or restraining princes on the upper waters of Napa Creek?" We are almost persuaded from the tone of this and other portions of the brief that counsel is really representing the insurance company and not the owner of the lighter.

It is elementary that the risk of loss or injury by an *unexpected* striking and stranding in tidal waters is a peril of the sea.

Fletcher v. Inglis, 2 B. & Ald. 315;

Letchford v. Oldham, 5 Q. B. D. 538.

Incidentally, it may be pointed out that the California Civil Code, Section 2199, explicitly includes "rapids" in its enumeration of perils of the sea, an incident of river travel ordinarily above high water mark.

However, even if the sea's tide, operating in an arm of the sea, the fall of which broke up the stranded lighter, is not a peril of the sea, it is *ejusdem generis* with such a peril and clearly falls under the following words of the policy, namely:

"all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of said vessel, or any part thereof".

Apostles, p. 72.

As to the defense of both unseaworthiness ^{and} or negligence, it is clearly established that where a peril of the sea is shown under the exception in a charter or bill of lading, the burden of proof of unseaworthiness or negligence is on the plaintiff or libellant.

The Northumbrin, 1906, P. 292 at 298;

Clark v. Barnwell, 12 How. 272;

Tyler v. De Fries, 78 U. S. 129.

Certainly the libellant has not established by the preponderance of the evidence either unseaworthiness or negligence.

However, even apart from the question of burden of proof, we have before affirmatively disposed of the contention that the lighter was unseaworthy by reason of overloading. She was carrying 200 tons and drawing two feet less than her full load and draft. The testimony of Hatt, the appellant's witness, claims and shows that even his own boats would break up if they stranded in the unfortunate position in which the lighter found herself.

Supra, p. 25 and 26

Besides this, her seaworthiness was supported by the usual presumption.

Werk v. Leathers, 97 U. S. 379, affirming *Werk v.*

Leathers, 29 Fed. Cases, 703;

Pyman v. Von Singen, 3 Fed. 802.

Appellant's weak attempt to show by the witness Buchanan, that the collapse was due to overloading or structural weakness, is of no avail in view of Buchanan's admission that he did not arrive till five days after she had "all broken up", 282 when already her decks were covered with the river sands. His opinion was, however, that it was not the angle at which she lay that caused her to break up (288), contradicting Hatt, who also testified *viva voce* to the contrary. As we have shown that the vessel was not overloaded, it must have been a structural weakness that caused her to break up, if Buchanan was correct at all.

It is of course apparent that if the loss was due to a structural weakness in the barge furnished to us *by appellant*, we are not liable to appellant. Though we

are puzzled, after reading its brief, to understand exactly what appellant's position is, we feel certain it is estopped to assert that we are liable for a collapse due to inherent weakness of structure in the boat *furnished to us by it*, which could not support a load three-quarters of her usual maximum.

It thus appearing that the loss was clearly one from which the charterer was exempted by the terms of the charter party we take up a consideration of the effect of such a provision even if it were not, as here, a mere transfer of the benefit of the owners' insurance to the charterer.

III.

A charter provision is valid which, as here, clearly and unequivocally excepts a peril of the sea even when contributed to by negligent navigation, or by any cause against which the underwriters could not successfully defend.

In our last section we have shown that the charter has, by apt and appropriate language, exempted the charterer from liability for a wreck, even if caused by negligent navigation.

The cases in both the Supreme Court and the Courts of Appeal clearly establish that such exemption may be made in charters, though not in bills of lading given by common carriers.

In *McCormick v. Shippy*, the excepting clause was "the charterer shall assume no liability for loss" and

the question was whether the word "loss" should include a loss caused by *neglect of the charterer in navigation*. The Circuit Court of Appeals then said:

"The general doctrine is stated by Judge Nelson in *New Jersey Steam Navigation Company vs. The Merchants Bank*, 6 How. 344, 383, 12 L. Ed. 465, as follows:

'If it is competent at all for the carrier to stipulate for the gross negligence of himself, and his servants or agents, in the transportation of the goods, it should be required to be done at least, in terms that would leave no doubt as to the meaning of the parties.'

There is no question of public policy involved in this charterparty, as in the case of a common carrier. It is well settled that the parties in such a case have the right to provide by apt language against liability for negligence. *Hartford Fire Insurance Company v. Chicago, Milwaukee & St. Paul Railway Company*, 175 U. S. 91, 98; *Baltimore & Ohio Southwestern Railway Company v. Voight*, 176 U. S. 498."

McCormick v. Shippy, 124 Fed. 48 at 50.

The rule established by that case (in which the charter is construed to cover negligence, though the word negligence is not mentioned) is that the intent of the parties must be derived from construing all the clauses in the instrument.

That is to say the words in our charter,

"You are to be responsible", and to return them in as good order and condition, etc., "happenings covered by their present policies of insurance excepted", i. e., perils of the sea,

must be considered in connection with the further words:

“if they are lost through any cause that will permit our underwriters to make *a successful defense* against paying the face of the policies you are to be responsible”;

and also in connection with the words

“We are to keep the lighters insured as they are at present insured”.

Under the familiar rule that we are to construe the “clauses of a contract so that they shall give effect rather than make void”, we must construe the words “any causes that will permit our underwriters to make a successful defense” and “we are to keep the lighters insured as they are now insured”, as having some reasonable function in the contract. Yet if we construe the words excepting perils of the sea as meaning “perils not arising from negligent navigation”, these clauses relating to the *defenses* of the insurance company and the *maintenance* of the *insurance* are purely surplusage.

As a matter of fact the clause referring to the defenses of the company is the paramount clause as far as this suit is concerned because this is the clause *specifically providing* for cases of *loss*, while the clause containing the inserted words “perils of the sea” applies merely to the *condition* of the lighters when *returned*. Under the rule that “particular clauses control general”, the defense clause must be held to control the other if there be any inconsistency.

But in this case there is no inconsistency. The clauses read together clearly indicate that the owners are to look to the insurers and to no one else for anything for which the insurers are responsible.

Our opponent practically admits that, outside of towage contracts (which we treat later) and common carriers' liabilities, there is no question that the charterer may, by proper language, exempt himself from liability even for the negligence of his own employees. Indeed, the decision of the Supreme Court in the *Barnstable* forces him to that position.

In that case the charter contained the agreement by the owner "to pay for the insurance of the vessel" and the question was whether this provision freed the charterers from a liability on the chartered vessel due to her collision with another vessel, arising from the negligence of charterer's agents.

The Court, after pointing out that the agreement to pay for the insurance was not even a covenant to insure (unlike the clause in our charterparty which was a direct covenant to keep up the insurance policies then on her), construed the clause as if it were such a direct covenant, and said:

"It may be conceded, however, that for any damage to the vessel coverable by an ordinary policy of insurance 'on the vessel' the owners must look to the companies, at least for the insured proportion of such damage, and not to the charterers. It may also be conceded that the owner might have selected a form of policy containing a special running-down clause that would have covered damages done to another vessel, though the rule in this

Court is, following the English case of *De Vaux vs. Salvador*, 4 Ad. & El. 420, that an ordinary policy against perils of the sea does not cover damage done to another vessel by collision."

The Barnstable, 181 U. S. 464 at 469.

The Court thus finding that the collision liability was not covered by an ordinary policy against perils of the sea, concludes that there is no definite undertaking in the charterparty to exempt the charterers from this liability. The Court says:

"If the responsibility for an extraordinary class of damages, that is, done to another vessel, be thus shifted from the charterer, by whose agents the damage is done, and to whom its reimbursement properly belongs, to the owners, *it should be evidenced by some definite undertaking to that effect*, and not be inferred from an *obscure* provision of the charter party, which seems to have been designed for a different purpose."

The Barnstable, 181 U. S. 464 at 471.

Following the *ratio decidendi* of *The Barnstable* case, we are driven to the conclusion that our charterparty, which has a definite undertaking that the owner shall insure the vessel and a definite undertaking that the charterer shall not be liable for perils of the sea even when caused by the neglect of its agents against which the insurers could not successfully defend, was "designed for the very purpose" of freeing the charterer from such a liability. No clearer reasoning could be asked for, to sustain Bennett & Goodall's position before this Court.

Another strong case supporting the doctrine that a carrier, other than a common carrier, may exempt him-

self from liability for the negligence of his employees, is *Long v. Lehigh Railway Company*, where the Circuit Court of Appeals reviewed the authorities and said:

“It is said that the contract in that case in terms included among the risks assumed by the express messenger accidents and injuries occasioned by negligence, while the contract here does not; and it is urged that, in the absence of such a stipulation, the contract should be construed not to extend to that class of accidents or injuries. This contention would doubtless be sound if the parties contracting had not been treating on terms of equality, as is the case between a common carrier or the shipper of goods or a passenger. But when this is not the case, and no rule of public policy forbids a contract by which one of the parties is exonerated from any risk arising from negligence, there is no reason why the ordinary rules of construction should not obtain, and the contract be given effect according to the intention of the parties. The observation of this Court in *McCormick vs. Shippey*, 124 Fed. 48, 59 C. C. A. 568, are appropriate:

‘There is no question of public policy involved in this contract, as in the case of a common carrier. It is well settled that the parties in such a case have the right to provide by apt language against liability for negligence. * * * The clause must be interpreted to include loss through negligence, because for loss not arising from negligence he would not be liable.’

So, in this case, the defendant, being merely a private carrier in respect to the plaintiff, owed him merely the duty of ordinary care, and could only have been liable to him for injuries arising from negligence, and the release made in advance must have contemplated accidents and injuries of that character. In *Bates vs. Railroad Co.*, 147 Mass. 255, the agreement between the express messenger and

the express company was that the former 'will assume all risk, and accidents and injuries resulting therefrom, and will hold said company free and discharged from all claims and demands in any way growing out of any injuries received by him while so riding'. In *Hosmer vs. Railroad Co.*, 156 Mass. 506, the plaintiff was an expressman and who had agreed that, in consideration of the company's allowing him to ride in baggage cars on its trains, he would 'assume all risk of accidents and injuries resulting therefrom'. In both cases the language of the contracts although not expressly including injuries or accidents by negligence, was construed to relieve the railroad company from liability for injuries by negligence. In *Chicago, etc., R. Co. vs. Wallace*, 66 Fed. 506, the language of the contract was as general as it is in the present case, and the railroad company was exonerated from liability."

Long v. Lehigh Ry. Co., 130 Fed. 870 at 873
(C. C. A.).

See, also:

The Fri, 154 Fed. 333 at 338;

Chicago Ry. Co. v. Wallace, 66 Fed. 506;

Bates v. Ry. Co., 147 Mass. 255; 17 N. E. 633;

Hosmer v. Ry. Co., 156 Mass. 506; 31 N. E. 652.

It is therefore submitted that when, as here, the charterer's liability for a wreck caused by a peril of the sea even if contributed by negligent navigation is plainly excepted the owner cannot hold him liable for the loss of the vessel from such a cause.

IV.

The charter of the barge is not a towing contract.

Our opponent admits that generally a charterer may exempt himself from liability for negligence of his servants (Appellant's Brief, p. 7). He claims however that a different rule applies to towing contracts and that the charter here in question is such a contract.

It is pertinent to note, as has appellant, that the lighter was a large box, without motive power, but we draw a wider inference from this fact. Appellant must have contemplated the likelihood that Bennett & Goodall would follow the usual practice in great harbors, where the division of labor is highly organized, and employ some tug as an independent contractor, and that the lighter might be lost by negligent navigation in which no servant of Bennett & Goodall participated.

Not only did the appellant necessarily contemplate this, but, as our opponent admitted, it gave its consent to a rechartering of the vessel to the Napa Gravel & Material Company, that is that the vessel should go into the possession of another person entirely, who might in turn engage such a tow boat.

Dr. Hengstler, *Apostles, p. 311.

One of the provisions of the subcharter to which it thus consented provided as follows:

* Two days after the testimony closed and our argument was begun, in which we laid stress on this point, counsel sought to reopen the case and withdraw the admission, but the Court (318, 319) refused to do so.

“The entire barges are hereby let and surrendered to said (Napa Gravel and Material Company) who shall have exclusive control thereof.” (p. 377.)

The question then is not one of the liability of Bennett & Goodall as principals for the negligence of their servant, but of their liability under a contract of bailment in which their responsibility is limited to a comparatively small number of causes of loss, and where the acts causing the loss are clearly shown not to have been committed by any of their servants, but by a person engaged by a third party to whom the lighter had been rechartered with the owner's permission.

Such being the case, we are unable to see how the charter to Bennett & Goodall must be construed as a towage contract between them and the appellant, much less an agreement that they would furnish their personal skill or that of *their* employees in the towage, and where the negligence, if any, is personal to them.

In all the cases on towage contracts cited by appellant the Courts' refusal to recognize stipulations exempting liability for negligence is based on the theory that such an exemption of personal liability tended to encourage negligence. This principle is clearly deducible from all the cases, which in turn trace their authority to *The Syracuse* where Judge Davis said:

“It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that, by special agreement, the canal-boat was being towed at her own risk, nevertheless, the steamer is liable, if,

through the *negligence of those in charge of her*, the canal-boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of *the persons engaged in her management*, the exercise of reasonable care, caution, and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences."

The Syracuse, 12 Wallace 167, at 171.

It is the negligence of those *towing* the lighter which it is *contra bonos mores* to free from liability from negligence, not of third parties having no relationship of employer to the negligent persons and no control over the vessel herself. How could it have made Lattimore, Crowley's employee, any the less negligent, to construe Bennett & Goodall's contract as not making them liable to the appellant for his negligence?

"When the reason for the rule ceases the rule ceases."

There is nothing in the decision in *Alaska Commercial Company v. Williams* which is in any way applicable to the facts here. That case clearly goes off on the theory that a person engaged in towing cannot exempt himself from his own negligence or the negligence of his employees, that is persons over whom he has control.

Alaska Commercial Company v. Williams, 128 Fed. 362, at 367.

All of the cases cited rely on the "Syracuse" and none are authority on the facts before the Court.

The latest case in the Court of Appeals is *The Oceanica*, 170 Fed. 893, in which a majority held that even a tug owner could contract against his employer's negligence. Judge Cox's dissent however shows clearly the limitations and purpose of the contrary doctrine. He says:

"The agreement of the canal boat to be towed at her own risk did not exempt the tug from liability for damages occasioned by her own negligence. The wisdom of this rule cannot be doubted. It ought to be against policy to permit a vessel to contract against her own fault. *To allow her to do so begets recklessness, carelessness and neglect.*"

The Syracuse, 170 Fed. 893.

How can it be said to "beget recklessness, carelessness and neglect" that Bennett & Goodall are not held liable for this loss from peril of the sea even if Lattimore's neglect did contribute?

The rule is laid down in "Cy" as being that

"a towing vessel cannot relieve itself by contract from liability for failure to exercise reasonable care and skill in the performance of the service and for the safety of the tow."

38 Cyc., 581.

The "vessel" cannot do it. Surely this is no authority for saying that Bennett & Goodall cannot exempt themselves from perils of the sea contributed to by the negligent navigation of a tug they do not own, have not hired and over which they have no control. The only

neglect Bennett & Goodall could have shown in connection with this transaction was in choosing an improper subcharterer who might have recklessly chosen in turn a poor tow boat man. Such a charge was not made and consent to the charterer to the Napa Gravel and Material Company completely precludes it.

V.

While the subcharter and the subcharterer's engagement of an independent contractor to tow do not make the charter to Bennett & Goodall any the less a bailment, nevertheless the freedom from complicity of Bennett & Goodall's agents in the loss removes any ground for objecting that an interpretation excepting negligence is *contra bonos mores*.

The above heading contains its own argument. The whole theory of interpretation against exempting negligence unless clearly expressed is based on the idea that if there is such an exemption it will discourage carefulness. When the person who has charge of the vessel or other article given in bailment, is entirely beyond the control of the bailee, with the permission of the bailor, the reason for the rule ceases to exist.

As we pointed out in our last chapter it could not in the slightest way affect Lattimore's carefulness that Bennett & Goodall of whom he probably has never heard, and certainly with whom he had neither the re-

lationship of contractor nor employee, were free from liability for his negligence.

We believe we have shown that the charter by incorporating the policy and hence including not only its risks but its disputes, expressly exempts the risk of a peril of the sea even though caused by negligent navigation. Our point here is that even if the exemption were not so clear, and we had to apply rules of construction, the rule construing strictly against exemptions for one's personal negligence or that of employees would not apply because the negligence, if any, was not of that kind.

Price v. Union Lighterage Company, 1903 K. B. 750, is clearly distinguishable on this ground, namely that the negligence was that of a party to the contract who had the duty of special care which devolves on a common carrier. Incidentally it may be remarked that the clause there was very general and loose, attempting to exempt "liability for any loss or damage to goods which can be covered by insurance". It did not refer, as here, to the risks covered by a particular policy of insurance or create a specific liability for risks for which the insurers could make a successful defense. It is true that in England a common carrier may stipulate against negligence, but the special duties of his status require that attempts to escape those duties should be strictly construed. No such peculiar status exists in our case where the charterer has no quasi public character.

See also in *Rosin & Turpentine Co. v. Jacob*, 11 Asp. 231, the lighterman was a common carrier and the negligence was his own. It has no application to a contract not for common carriers and *a fortiori* no application where the negligence is that of a third person.

So also in *The Forfortshire*, where the clause did not mention negligence and could have a clear and rational meaning without covering it, and the negligence was that of the employees of the claimant.

We admit the correctness of the cases cited by our opponent as holding that under an ordinary charter with no exceptions, the charterer is liable for the loss of the vessel by the neglect of a tug employed by him.

Gannon v. Ice Co., 91 Fed. 539;

Thompson v. Winslow, 128 Fed. 73;

Winslow v. Thompson, 134 Fed. 546;

William H. Beard Co. v. Hughes, 121 Fed. 808.

The point we make here is that in construing a charter which does have exceptions, those exceptions should not be interpreted with any hostility against freeing the charterer from liability for the negligence of a third party over whom the charterer has no control. And this is true *a fortiori* in the case at bar where the charterer can escape liability only in the event *that the owner can recover an equal amount from his insurer.*

VI.

Even if the wreck had been caused by the negligence of an employee of the charterer, it was no more wrongful for the owner and charterer to contract that the owner should look solely to the insurance company for its compensation than that the owner should make the admittedly proper insurance contract whereby the loss falls on the insurance company, even if caused by the negligence of the owner's employee.

We have heretofore shown that an insurer is liable for a peril of the sea regardless of the fact that the peril arose from negligent navigation. In making such a policy the insurer must have contemplated that the lighter might be chartered, and there was nothing in the policy warranting against chartering or that the barge would remain in the possession of the insured. In fact the policy was for the "benefit of whom it may concern".

Such being the case we are unable to follow the extraordinary argument that it is *contra bonos mores* for the owner to collect his insurance and not give the insurer the right to sue the charterer for his negligence. If the loss has been by the owner's negligent navigation the insurer would have had no right against him. Why should the insurer be in any better position where the loss arose from the negligent navigation of an experienced tow-man employed by a responsible sub-charterer than where it arises from the neglect of the person directly insured? We submit that our opponent's brief vouchsafes no answer to this query.

As we have pointed out the Courts have repeatedly held that even a common carrier may contract to receive the benefit of the shippers' insurance on his goods where the loss is admittedly by the carrier's negligence.

VII.

The non-production of witnesses.

In this case it has been clearly shown that as soon as we have proved a loss by a cause excepted in the charter, i. e., perils of the sea, the burden shifts to our opponent to show that it was caused by negligence.

Tyler v. De Fries, 78 U. S. 129;

Clark v. Barnwell, 12 How. 272.

Whatever unfavorable inference may be drawn from a failure to summon other eyewitnesses than Lattimore, should lie against the appellant. The burden was on it to make out its exception and a failure to bring the witnesses, if leading to any adverse conclusion, suggests an inference that if produced their testimony would not have sustained the burden of the American-Hawaiian Company.

Certainly the failure to produce the employees if the Napa Gravel Co. cannot be urged against Bennett & Goodall. That company's position was as hostile to us as to the libellant.

None of the cases cited by our opponent apply to us. *Hicks v. Ry. Co.*, 62 N. Y. Supp. 597, 599, treats of the presumption arising from the failure of an "employer" to call a witness "in his employ" at the time of the accident.

Hill v. Vanderpool, 156 Pa. Stat. 152, likewise refers to evidence shown to be “*in the control of a party*”. *Moore on Facts*, sec. 563, speaks only of a witness who is shown to be “*at hand and cognizable of the facts*”. *Union Trust v. McClellan* applies the rule only to the party who has the “burden to prove a material fact”.

Bennett & Goodall come under none of these. It did not employ the other persons. They are not and were not under its control. They are not shown to be at hand at the trial. Finally no burden of proof required it to produce them in any event.

VIII.

CROSS APPEAL. If the charterer, Bennett & Goodall, is liable, it should have a decree against the Napa Gravel & Material Company and its bondsman the American Bonding Company.

The subcharterer, the Napa Gravel & Material Company, and its bondsmen on its charter, were joined under the provisions of the 59th rule of the Supreme Court. The subcharterer and its bonding company moved for the dismissal of the petition for their joinder and this motion was denied by Judge De Haven.

Evans v. New York S. S. Co., 163 Fed. 405;

British and Foreign Ins. Co. v. Kilgour, 184 Fed. 174.

The record shows that, under the subcharter, the Napa Gravel & Material Company was

“fully responsible for and to pay on demand, any and all damages and deterioration to the said barges, and to each and both of them, not directly due to ordinary wear and tear, or not included in and covered by the insurance policies now, or hereafter, in existence, insuring said barges”.

Record, p. 57.

The bonding company agreed that it would be liable in the penal sum of \$15,000, gold coin of the United States, if the Napa Gravel & Material Company did not “faithfully perform all the obligations of the said agreement”.

“Provided, however, that the surety shall not in any event be liable for the payment of any damage or loss coverable by policies of insurance insuring said barges against damage or loss by accident or fire.”

Apostles, p. 59.

If the Court should hold that there was negligent navigation leading to the loss by peril of the sea and Bennett & Goodall's charter does not free them from liability for such a loss, then Bennett & Goodall is entitled to a decree against the Napa Gravel and Material Company and the American Bonding Company.

As the same facts govern the liability under these two agreements as under that of Bennett & Goodall, the cross appeal is submitted without further argument.

Respectfully submitted,

EDWIN T. COOPER,

WILLIAM DENMAN,

DENMAN AND ARNOLD,

*Proctors for Bennett & Goodall Appellee
and Cross-Appellant.*

No. 2230

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN-HAWAIIAN STEAMSHIP COMPANY
(a corporation),

Appellant,

vs.

BENNETT & GOODALL (a corporation), NAPA
GRAVEL & MATERIAL COMPANY (a corpora-
tion) and AMERICAN BONDING COMPANY OF
BALTIMORE (a corporation),

Appellees,

and

BENNETT & GOODALL (a corporation),

Cross-Appellant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY
(a corporation), and NAPA GRAVEL & MA-
TERIAL COMPANY (a corporation), and
AMERICAN BONDING COMPANY OF BALTI-
MORE (a corporation),

Cross-Appellees.

BRIEF OF AMERICAN BONDING COMPANY OF BALTI-
MORE, IN REPLY TO BRIEF OF BENNETT &
GOODALL ON LATTER'S CROSS-APPEAL.

The facts upon which liability of this appellee is predicated are that under the subcharter, the Napa Gravel & Material Company agreed to be

“fully responsible for and to pay on demand, any and all damages and deterioration to the said barges, and to each and both of them, not directly due to ordinary wear and tear, or not included in and covered by the insurance policies now, or hereafter, in existence, insuring said barges”.

Pursuant to the terms of its subcharter, the Napa Gravel & Material Company gave to Bennett & Goodall a bond whereon the present cross-appellee was surety, which is set forth at pages 58 et seq. of the apostles.

The bond was conditioned that the Napa Gravel & Material Company should faithfully perform all the obligations of its subcharter; and to this extent and so far, the case in defense of this cross-appellee, the Bonding Company, is exactly the same as the case of the original respondent, Bennett & Goodall or of its principal the Napa Gravel & Material Company.

The Bonding Company, however, expressly limited its liability and in the bond referred to was the provision (Apostles, p. 56).

“Provided, however, that the surety shall not in any event be liable for the payment of any damage or loss *coverable* by policies of insurance insuring said barges against damage or loss by accident or fire.”

The chief subject of argument between the original libellant and respondent here are first whether or not the barge was lost through negligence, and second, whether such a loss was intended to be covered by the agreements between them.

But whether the liability for negligence was or was not actually covered by their agreements, there can be no question but that the negligence is *coverable* by insurance policies, in other words that a policy would be valid if it in terms insured the owner, or charterer or subcharterer against the loss of the barge or damage to it caused by negligence.

The question has been decisively settled even where the negligence arose in the case of the relation of a carrier to its passengers or freight as the case might be—a duty and a liability far in excess of ordinary common law liabilities fastened upon the ownership and conduct of properties.

In

Phoenix Ins. Co. v. Erie etc. Co., 117 U. S.

at 323, the Supreme Court states the rule:

“So a common carrier, a warehouseman or a wharfinger, whether liable by law or custom to the same extent as an insurer, or only for his own negligence, may, in order to protect himself against his own responsibility as well as to secure his lien cause the goods in his custody to be insured to their full value, and the policy need not specify the nature of his interest. (Citing cases.)

“No rule of law or of public policy is violated by allowing a common carrier like any other person having either the general prop-

erty or a peculiar interest in goods to have them insured against the usual perils and to recover for any loss from such perils *although occasioned by the negligence of his own servants.*”

In

California Ins. Co. v. Union Compress Co.,
133 U. S. at p. 414, the Court said:

“This Court is also asked to review its announcement of the principle of law laid down in Phoenix Ins. Co. v. Erie and W. Trans. Co., 117 U. S. 312, 324, that ‘no rule of law, is violated by allowing a common carrier, like any other person having either the general property or a peculiar interest in goods to have them insured against the usual perils and to recover for any loss from such perils, though occasioned by the negligence of his own servants.’ * * *

“Nor are we disposed to review our decision that common carriers can insure themselves against loss proceeding from the negligence of their own servants. The doctrine announced in the case cited has been referred to with approval in the subsequent cases of Orient Ins. Co. v. Adams, 123 U. S. 67, 72, and Liverpool Stearn Co. v. Phoenix Ins. Co., 129 U. S. 397, 438.”

The citation of all the cases following these would hardly seem profitable, but there may be noted:

Hartford F. Ins. Co. v. Chicago etc. Co.,
20 S. Ct. Rep. at p. 36;

Kansas City etc. Co. v. Southern etc. Co., 52
S. W. Rep. at 207;

Trenton etc. Co. v. Guarantor's etc. Co., 37
 Atl. Rep. at 611;
 Boston etc. Co. v. Mercantile etc. Co., 34
 Atl. Rep. at 786;
 Minneapolis etc. Co. v. Home Ins. Co., 66
 N. W. Rep. at 135.

In this Court, the question arose in the case of
 Munich Assurance Co. v. Dodwell, 128 Fed.
 Rep. 410,

where, citing and following the Phoenix case, this
 Court said:

“It had the right to insure against its own
 negligence as well as against the necessity of
 being required to enter into the inquiry whether
 its own negligence caused or contributed to the
 standing of the vessel, the jettison and the re-
 sulting general average charges.”

The Civil Code of California, where this bond was
 executed provides:

“Any contingent or unknown event, whether
 past or future, which may damnify a person
 having an insurable interest, or created a lia-
 bility against him, may be insured against,
 subject to the provisions of this chapter.”

Civil Code, Sec. 2531.

And in the California case of

Stephens v. S. P. Co., 109 Cal. 95,

the Phoenix and California Insurance Co. cases,
 above referred to, are cited and followed.

It is accordingly respectfully submitted that as
 at the most the vessel was lost through negligence

and as a valid policy of insurance could have been written insuring any person having an insurable interest in the barge against such negligence, the loss was one "coverable by policies of insurance" according to the exemption clause in the bond of this Bonding Company; and that accordingly a judgment should be awarded in its favor.

JESSE W. LILIENTHAL,

ALBERT RAYMOND,

*Proctors for Respondent and Cross-Appellee
American Bonding Company of Baltimore.*

No. 2230

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN-HAWAIIAN STEAMSHIP CO.

(a corporation),

Libelant and Appellant,

VS.

BENNETT & GOODALL (a corporation),

Respondent and Appellee.

APPELLANT'S REPLY BRIEF TO BRIEF OF BENNETT & GOODALL.

In answer to respondent's argument we respectfully submit:

First. The Court below has made no finding regarding the negligence of respondent or those for whose acts respondent is responsible. It is open to this Court to make a finding on this issue. If the Court finds that the launchman, or the Napa Gravel and Material Company, and consequently respondent Bennett & Goodall, were negligent in the handling of the lighter, and that this negligence caused its destruction, then we claim that, under a proper

construction of the contract, the decree should be reversed.

The legal principles upon which the question of negligence, in connection with the towage of this barge, rests, are well expressed in the recent case of

Consolidated Coal Co. v. Steam Towage Co.,
200 Fed. 840, 843,

where the Court says:

“It may be stated generally that, while a steam tug is not an insurer of the safety of her tow, she is held to the use of the reasonable care exercised by ordinarily prudent mariners engaged in such service, and that *such care is to be measured by the dangers and difficulties to be encountered*. When the towage service is performed in the home port of the steam tug, or upon a river * * * where the towage company is the only one engaged in towing large vessels, *a much greater degree of care is required in ascertaining the depth of water and the character of the bottom.*”

Also in *Susquehanna Coal Co. v. Dredging Co.*, 200 Fed. 817, where Judge Dodge of the Massachusetts District said at p. 825:

“The Devon (a barge) was without motive power of her own, her navigation was wholly under the tug’s control, all her movements were subject to the tug’s direction, and there is no suggestion of any independent action on the Devon’s part having a tendency to cause her to run aground. *Under such circumstances the fact that the Devon grounded raises a presumption that the tug was negligent*, as in *Burr v. Towage Co.*, 132 Fed. 248; *The W. G. Mason*, 142 Fed. 913. * * * *The burden is on the tug to explain the cause of the disaster.*”

Second. This Court is at liberty to determine the degree of negligence and fix it as *wilful negligence or recklessness*, on the ground that the only eye-witness who testified as to the facts of the accident, was not examined in the presence of the lower Court, but before a Commissioner. It is settled that, under such circumstances, findings of the Court are not of the same weight, and that this Court, after reviewing the evidence, may reach its own conclusion. The rule cited in respondent's brief, page 9, in the language of Judge Ross, in "The Captain Weber", is expressly predicated upon the fact that "the evidence was given in open Court", and does not, therefore, apply here.

This Court is also requested, in reviewing the evidence, to give due weight to the propositions (a) that the burden of showing *how* the accident happened, while the lighter was navigated by employees identified with respondent, was clearly on respondent; (b) that respondent failed to take the testimony of any of the eye-witnesses; (c) that the legitimate inference from (b) is that the testimony of the eye-witnesses would have been unfavorable to respondent.

Third. This Court is at liberty to decide that, under the evidence, the lighter was lost through a *cause which would exonerate the insurance company*, on the ground that the finding of the Court below that, "If there was negligence of any kind, it was simply ordinary negligence", is not a finding of fact, but a pure conclusion of law. Where the

question arises, whether or not the facts show negligence at all, it may be argued with plausibility that such a question presents an issue, and involves a finding of fact; but the question, whether or not the negligence predicated upon a given state of facts amounts to the grade which, under section 2629 of the Civil Code, exonerates the insurer, is a pure question of law.

Fourth. There is no real conflict in the evidence bearing on the issue of the wilful negligence of the Napa Gravel and Material Company, if the facts alone are regarded.

a. The witnesses on both sides agree that proper navigation demands that the danger-place, Horse Shoe Bend, must be passed *before the turning of the tide*.

The evidence shows clearly that the danger-place was reached some hours after high tide, at the most dangerous time.

We have shown in our brief, pages 33-37, that navigation at this point in a falling tide is dangerous, especially before the reef above the curve was removed. Proper navigation required that this point should be passed *before* high water. When did the launch reach this point, with the loaded lighter in tow? Counsel for respondent, on page 13 of its brief, states that the dangerous place was reached at "*the most favorable moment for passing, i. e., high tide*". The statement is the result of mathematics evolved from imaginary premises, and

is in shocking conflict with the testimony of his own witness, the only one who knows the facts.

Lattimore testifies:

“You *leave* your destination about high water or something like that. * * * *As close to high water as you can*, and then you start down the creek; the further you come down the creek naturally the quicker you get the ebb-tide.” (Apostles, p. 325.)

On cross-examination by counsel for respondent he testified:

“Q. You say the condition of the tide at the time you left Napa, or the upper portion of the creek nearest to Napa, was *about flood tide*?

A. Yes, sir.

* * * * *

Q. Was that the most favorable condition of the tide for coming down the stream with that tow?

A. Yes, sir.

Q. You waited for that, did you?

A. Yes, sir.” (p. 336.)

He testified that he took the lighter in tow “something around ten o’clock” (p. 324); that the barge went ashore “about two o’clock, I should judge” (p. 328); that he “had traveled a considerable distance down the creek before this accident happened”. (p. 338.)

In the face of this positive testimony counsel claims that the launch and lighter reached Horse Shoe Bend *at* high tide. We need not take literally Lattimore’s statement that he left the loading place

just at 10 o'clock (p. 324), and arrived at Horse Shoe Bend just at 2 o'clock (p. 328); but certainly the only fair inference from his testimony is that a considerable length of time (possibly less than four hours) elapsed between the time when he started with launch and tow and the time when he arrived at the danger-point. If we adopted counsel's mathematical method, the testimony of the only eye-witness would show, without contradiction, that he reached the bend four hours after high tide. Even counsel would be forced to admit that these facts, and the testimony of his own expert witnesses: Crowley, Fisher, and Johansen (our brief, pp. 33-37), would have to be disregarded in order to come to any other conclusion except the conclusion that the barge arrived at the critical spot in Napa Creek at the *most unfavorable, and most dangerous* moment for passing.

According to the arrangements that were made, Mr. Burgess, who loaded the barge for the Napa Gravel and Material Company, dispatched Lattimore (p. 227). To send him, who had never before taken that barge, or any other barge of the same size, as high up the creek before (p. 332), against his protest, down the crooked creek in "a very dark night" (p. 330), with a heavy and unwieldy tow in charge of the insufficient gasoline launch, trusting to the ebb-tide as motive power, was an utter and reckless disregard of ordinary caution on the part of the Gravel Company. It was known that, if this clumsy combination would not go ashore before

reaching the dangerous Horse Shoe Bend, the inexperienced pilot would have to so skillfully manoeuver his craft as to squeeze through between the end of a reef jutting from the left bank, and the opposite bank, and then to make successfully a dangerous turn immediately below. The natural difficulties invited the barge to either go ashore on the right bank, or, if the launch succeeded in saving her from that fate and to give her an impetus away from that danger, to send launch and tow, at the turn, on the left bank. There was no other choice under the circumstances prevailing at the critical moment—no chance of safety.

There were two reasons why the Gravel Company did not start the loaded barge, with the launch, before the turn of the tide:

First. The launch was not powerful enough to tow against the tide. (Fox, pp. 267, 268.)

Second. “Tide work”, as practised by the Napa Gravel Company, “means that she has to leave on the tide” * * * “about flood tide”, that being “the most favorable condition of the tide for coming down the stream with that tow”. (Lattimore, p. 336.)

“Q. You use the ebb-tide to take her down the creek?

A. Not exactly. *It helps you along a good deal.*”

She floated down with the tide; her motive power was furnished by the receding tide. The function of the gasoline launch was to keep her in the

stream, off the banks, and, in particular, to guide her around the bends. One of the witnesses testified that the launch might have been sufficient, if the launch, on an ebb-tide, had "dropped back of the barge" and thus brought her around the bend; but that she was not sufficient to tow the barge safely in the manner attempted in this case. (pp. 277, 278.) The account of Lattimore clearly shows that the launch could not, and did not, do her work when he arrived at the dangerous Horse Shoe Bend.

b. The evidence shows that the towage was insufficient; that the *master protested* against the operation, but that the Napa Gravel Company ordered him down the creek *against his protest*.

Counsel for respondent, on the point of wilfulness, argues as follows:

"The evidence as to the *power of the launch* equally supports Judge Bean's findings as to a want of recklessness or wilful negligence. All the captains of launches agree that she had ample power to handle the barge in these sluggish waters. Mr. Crowley, the man of the largest experience, testified as one having seen that the launch was adequate for the work, and *like-wise Lattimore who had her in charge.*"

None of the captains of launches who testified knew anything of the actual facts; as "experts" they were privileged to give it as their "*opinion*" that a 50 H. P. launch was as good or better than a steam tug. In considering the value of the opinions of the gasoline launch experts, the Court might well take judicial notice of the whimsical nature of

gasoline launches, which have a notorious habit of striking work at unexpected moments. The "opinions" cut a poor figure when placed by the side of the facts. The *facts show* that the launch was *not* adequate for the work. If Mr. Lattimore, as he testifies, was four hours in coming from the loading place down to Horse Shoe Bend, with the ebb-tide, it is a safe guess that he spent some of that time in getting his charge off the bottom or the banks of the creek; how often that happened before the final and fatal stranding, he only knows, and the other two men in the Gravel Company's employ, who were not produced as witnesses by their employer. But the evidence does show plainly that *Lattimore knew the perilous character of the operation; that the Napa Gravel and Material Company knew it, but wilfully insisted upon sending the launch, with her heavy tow, into imminent danger.*

Captain George H. Pinkham testified as follows:

"Q. Did you, either before or after the accident, have any conversation with Lattimore with reference to his towing that barge down the river?

A. At the time the barge went ashore.

Q. What did he say to you at the time?

A. He told me that it was too unwieldy for him to handle with that towboat." (p. 292.)

Again:

"A. He told me that that barge was too unwieldy to handle; and *they told him, you have gone down once with that barge, you have gone down once, and he said, you must not think because I have did it once I can do it every time successfully.*" (p. 293.)

This conversation took place on the day following the accident. (p. 296.)

We ask the Court to consider this testimony in connection with Lattimore's that never before that evening had there been a man on the barge.

“Q. Do you know why there was a man on that barge that particular night?

A. I made a kick for a man; I asked for a man.” (p. 343.)

Captain Pinkham's testimony, above referred to, was vigorously objected to as being inadmissible under the rules of evidence, and the lower Court permitted it to go into the record reluctantly, Judge Bean acting upon “the general rule * * * that an agent cannot make an admission that would bind the principal after the accident”. (p. 293.) The judge did not consider this testimony competent (p. 293), and, undoubtedly, arrived at his conclusions of fact and law without giving it any weight.

We respectfully beg leave to show that, under the authorities, this evidence is competent, and should have been considered by the Court.

In *Packet Company v. Clough*, 20 Wall. 528, the Supreme Court. in an action at common law, said:

“What the Captain of the boat said of the transaction two days afterwards was, therefore, but a narrative of a past occurrence, and for that reason it could not affect his principals. It had no tendency to determine the nature, quality or character of the act done, or left undone * * *.” (p. 541.)

The Court continued:

“The case of *The Enterprise*, cited from 2d Curtis, was a suit in *admiralty* for subtraction of wages, and the declarations of the master respecting the contract with the seamen were admitted, though not a part of the *res gestae*. But the decision was rested upon the ground that *the admiralty rule is different from the rule at common law.*”

In *The Enterprise*, 2 Curt. 317 (1870), Judge Curtis said on this subject:

“It has been argued that the master is but the agent of the owner, and that to render his admissions evidence against the owner they must be made in the course of the execution of his lawful authority, and as part of *res gestae*. This is the ordinary rule. But *the admiralty treats the master's declarations as standing on different ground from those of a common agent*. He is himself liable personally for the wages. He thus stands in the relation of a principal debtor, liable for the same debt to which the owner is subject. And even where there is no liability *ex contractu*, I apprehend *the confessions of the master, though not those of a mate, pilot, or seaman*, have been constantly received in evidence by courts of admiralty,” citing *The Manchester*, 1 W. Rob. Adm. 63, and other English cases, and continuing:

“I am not aware that the question has been discussed in this country, but *I am quite sure the practice has been to admit declarations made by the master, while in command, concerning any matters which came under his authority as master, though not part of any res gestae strictly speaking.*”

In *The Manchester*, 1 W. Rob. Adm. 63, a collision case, Dr. Lushington admitted the confessions of the master that his vessel was at fault, on the ground that the master stands upon a different footing in point of law from an ordinary agent.

In *The Potomac*, 8 Wall. 590, it was held that the admissions or confessions of a master, after a collision, were proper evidence against the owner, the Supreme Court saying:

“The legality of this evidence cannot be questioned, for courts of admiralty have uniformly allowed the declarations of the master, in a case of collision, to be brought against the owner, on the ground that when the transaction occurred, the master represented the owner, and was his agent in navigating the vessel. This sort of evidence is confined to the confessions of the master, and cannot be extended to any other person in the employment of the boat, for in no proper sense has the owner intrusted his authority to any one but the master.” (p. 594.)

In *The Fremont*, 3 Sawy. 571 (1876), Judge Hoffman said:

“From some expressions of the master of the *Fremont* subsequently to the collision it would seem that he attributed the accident to the *insufficiency of his smaller anchor*, of which he was previously aware. As to the admissibility of such declaration, see *The Potomac*; *The Enterprise* * * *.”

In *The Lisbonense*, 53 Fed. 293 (C. C. A., 2nd, 1892), a collision case, involving the conduct of a French vessel, the records of the French Consulate,

containing statements made by the master and members of the crew, were offered in evidence.

Held: This record was admissible in so far as the *master's statement* was concerned.

In *The Fanwood*, 61 Fed. 523 (1894), Judge Brown of the Southern District of New York said:

“The evidence of the pilot’s admissions, not being a part of the *res gestae*, but made some time afterwards, are not, as I understand, competent evidence against the owners; it is *only the master whose admissions, as the general representative of the owner, are thus admissible.*” (p. 525.)

In *The Severn*, 113 Fed. 578 (1902),

“one of the questions much discussed was whether or not certain statements made by the master of the Severn *the day after the collision, as to how the same occurred*, was admissible in evidence against the ship. Objection was made to the admissibility of this evidence upon the examination of witnesses orally before the court, and the same was received subject to exception * * * but, in any event, *it seems quite clear that such admissions from the master of the ship are received against the owner in proceedings in admiralty.*” (p. 579).

All the cases cited support the rule that *declarations by the master of the ship are received against the owner in proceedings in admiralty.*

An additional reason for admitting this evidence is that it *corroborates* Lattimore’s testimony that the reason why there was an additional man on the barge in the night of the accident was that “I made

a kick for a man; I asked for a man". (p. 343.) Obviously he anticipated trouble.

Fifth. Had the lower Court considered the fact of Lattimore's unsuccessful protest and remonstrance, in weighing the evidence bearing on the degree of negligence involved, the Court might well have found that *wilful negligence* was the cause of the loss. The Court, expressing the view, that

"in my judgment it is *not competent testimony*, but counsel may have it put into the record, *for the future*, if he desires to do so, subject to your objection," (Ap. p. 293)

presumably permitted the introduction of this testimony only for the purposes of appeal, and gave it no weight in arriving at its own findings. We submit that it is material and competent, and that it should have great weight in showing that the Napa Gravel and Material Company acted with *wilful negligence* in sending the lighter to destruction.

Sixth. The "actual occurrences of the wreck" present a perfect case of *res ipsa loquitur*.

Counsel for respondent, in his brief (p. 22), states that "evidently he was for a while 'bucking' the last of the flood tide". If anything is evident in this case, where respondent and the parties identified with it in responsibility are strangely reluctant in producing the facts, it is that Lattimore used the ebb-tide in this "tide work", and that his launch had no power to buck the tide with her heavy tow. (p. 267.) The reef running across the creek was situated just before the bend was reached where the

lighter went ashore. (p. 327.) The occurrences at the bend are correctly described in our brief, page 36, except that, inadvertently, the words: "His (Lattimore's) description of the accident at Horse Shoe Bend in Napa Creek is as follows" are misplaced. They should follow *after* the paragraph immediately following, and beginning with the words: "He was in charge". The citations to the apostles, in that paragraph, refer to the testimony of various witnesses, and bear out the statements in that paragraph.

Counsel's theory of the "snag", and the "eddy" (brief of Bennett & Goodall, pp. 23-25) is based upon a very flimsy foundation, as is quite apparent from the citations in counsel's brief.

On page 325, Lattimore says: "whether it was an eddy *or what it was, I don't know.*" On page 326: "There was something, whether it struck the wheel at that time, *I could not tell * * **". "It was a dark night, and I could not see what it was. The way the barge took her sheer, it *might have been* the stump of a pile hit the wheel, the propeller."

It is submitted that this is not a showing that either an eddy or a stump in fact existed in that place, or that either of them hit the propeller. The fair inference from the facts shown is that the propeller was broken by striking the bank. Lattimore very naturally "found that the rudder was out of condition and one of the blades of the propeller was gone", *after* he had succeeded in getting his launch back into the creek. (p. 329.)

Seventh. The cause of the destruction of the barge was the *wilful negligence* of the Napa Gravel & Material Company, in the following particulars:

1. In navigating the barge in the crooked waters of Napa Creek *by means of the receding tide*.

2. In starting the navigation so high up the creek, that, in using the tide, the barge *arrived at the dangerous Horse Shoe Bend at the most critical time of the tide*.

3. In furnishing towage of obviously insufficient power.

4. In compelling the unwilling launchman, in spite of his remonstrance, to take the barge down the creek.

We are content to rest the distinction between mere passive negligence on the one hand, and a wilful act, on the other hand, on the Nome Beach case. (133 Fed. 636; 167 Fed. 119.) This Court held, in that case, that a wilful act may fall short of fraud; that “an *intent* to do a wrongful act or to omit the performance of a duty is necessarily wilful”. (The Court, by his Honor, Judge Ross, p. 618.) In sending the combination of barge and launch down Napa Creek, with *knowledge of the danger* waiting in the darkness of Horse Shoe Bend, and after being warned by the launchman that he could not handle the barge with that tow boat, the persons working for the Gravel Company *intentionally* exposed her to desperate chances. When the directors of this operation sent the combination of barge

and launch down the winding creek in charge of a protesting captain; when, being warned against the dangers of the proposed operation, they insisted upon its being carried out, they set their will and intent on the performance of an act which they knew to be dangerous of performance; they acted wilfully, intentionally; they were actuated by at least an intent to omit the performance of a duty, if not an intent to do a wrongful act.

Eighth. Respondent's theory is that this case does not deal with the negligence of respondent, but the negligence of a launchman not his employee who is towing it under an "*independent contract*". (Brief of Bennett & Goodall, pp. 5-6, and *passim* throughout the brief.) On this point we submit that the cases show conclusively that the negligence of Lattimore or his Towboat Company is the negligence of the Napa Gravel & Material Company; that the negligence of the Napa Gravel & Material Company (both in hiring incompetent towage, and in using the lighter in dangerously conducted operations) is the negligence of Bennett & Goodall.

The principles laid down in the case of *Gannon v. Ice Co.*, 91 Fed. 539 (C. C. A. 2nd Circ., 1899, cited in our brief, p. 45), govern this point conclusively. In that case, as in the case at bar, responsibility for the damage was disclaimed on the ground that the owner of the towboats whose servants caused the damage by their negligence was an independent contractor, and that his servants were not the serv-

ants of the charterer. But the Court held (syllabus):

A bailee for hire is responsible for the proper care of the article hired, not only by himself, but by any one else to whom he intrusts it; and a defendant company, which hired a canal boat for use in its business, and contracted with a third person to use it, is liable for an injury to the boat received through the negligence of the contractor's servants.

The Court said:

"The appellant could not absolve itself from its duty as bailee to take proper care of the boat by delegating that duty to another. The hirer of property is liable, not only for his own personal default or negligence in its custody, but also for that of *any other person whom he permits to use it*. Schouler, Bailm., sec. 145; Story, Bailm., sec. 400."

We have cited, in our brief, pages 45-46, other conclusive authorities to the same effect, and submit that respondent's position on this point is untenable.

Ninth. Counsel argues that "the charter of the barge is not a towage contract. (Brief of Bennett & Goodall, chap. IV, pages 43 et seq.)

We do not claim that it is a towage contract. We claim that, in chartering a lighter without power, the bailee assumes the *duty to furnish proper towage* for its use; that the bailee agrees to tow the lighter only in connection with *a proper towboat, properly manned*. This is the identical duty which

the tower assumes in making a contract of towage with the owner. The latter duty exists, in law, in spite of any attempt to bargain it away. (Our brief, pp. 7-11.) Hence respondent's attempt to exempt itself from liability is without legal sanction.

The insinuation made in counsel's brief, on page 33, that "We are almost persuaded from the tone of this and other portions of the brief that counsel is really representing the insurance company and not the owner of the lighter" shows want of proper respect for the Court to which it is addressed. The argument that our side represents only the interests of an insurance company could not possibly have any weight except before a prejudiced Court. But waiving its impropriety, the unwisdom of the argument is apparent from the fact that 52 pages of counsel's brief are consumed in an effort to protect a party which, according to the 53rd and last page of the same brief, is the only party ultimately liable for the misconduct of respondent Bennett & Goodall, and which party happens to be an insurance company, viz., the American Bonding Company.

Respectfully submitted,

LOUIS T. HENGSTLER,

Proctor for Libellant and Appellant.

No. 2230

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY

(a corporation),

Appellant,

vs.

BENNETT & GOODALL (a corporation), NAPA
GRAVEL & MATERIAL COMPANY (a corporation)
and AMERICAN BONDING COMPANY OF BALTIMORE
(a corporation),

Appellees,

and

BENNETT & GOODALL (a corporation),

Cross Appellant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (a corporation), and NAPA GRAVEL & MATERIAL COMPANY (a corporation), and AMERICAN BONDING COMPANY OF BALTIMORE (a corporation),

Cross Appellees.

CLOSING BRIEF OF BENNETT & GOODALL, IN REPLY,

- (a) To Appellant American-Hawaiian Steamship Company, pages 1 to 26;
- (b) To Cross Appellee American Bonding Company of Baltimore, pages 27 to 31.

I.

The Appellant Defies the Federal Tide Table and Its Own Experts in Its Endeavor to Establish Its Burden of Wilfulness of the Insured.

In its opening brief, appellant puts into Lattimore's mouth the direct statement, as his "description of the accident", that the launch "was not powerful enough to tow against the tide" (267). It started,

"in a very dark night (p. 330), from a place in Napa Creek, with the heavily laden lighter in tow, about 10 o'clock P. M., a little before or about at high water (pp. 324, 325), 'the meanest tide to get ashore on' (p. 268). The ebb tide 'helps you along a good deal' (p. 325). At the time he got to Horeshoe Bend, it was very swift ebb tide (pp. 185, 186); the bend was a particularly dark spot (p. 246), and a 'very sharp bend', where 'one has to be very careful in navigating' (p. 261)."

Appellant's Brief, p. 31.

When we come to examine Lattimore's testimony, we find that he did not make any of these statements save that it was a dark night, that he started about ten o'clock, a little before or about at high water (whether at the heads or the gravel beds does not appear), and that as he got down the creek the ebb tide would help him.

Lattimore at no time said that his launch was "not powerful enough to tow against the tide". This was said by Fox (267), who immediately before this stated that he had never handled gasoline launches himself personally and "would not care to testify as an expert on that branch of towage". Fox was squarely con-

tradicted as to the power of the launch by all the men using gasoline boats. In the mouth of Lattimore, this item of his alleged "statement" might be significant. Coming from Fox, it was clearly outweighed in Judge Bean's mind by the testimony of all the experts in gasoline boats.

Lattimore at no time said that he came down the creek on "the meanest tide to get ashore", or that when he reached Horseshoe Bend it was "very swift ebb tide". The first statement is that of Fox, the steamboat man, who knew nothing of the greater facility of the small, compact gasoline tug with its ability to apply its power in shallow water at much higher angles to the tow than the heavier deep draft steam tugs.

The statement that it was "very swift ebb tide" when the lighter reached Horseshoe Bend is not only not Lattimore's, but is not a fair summary of any witness' testimony. Undoubtedly the writer of the brief would depend on Captain Bennett's evidence at page 185, as follows:

"Q. Supposing, Captain, this man who was in charge of the launch and barge in this case had left the starting place four hours before he got to Horseshoe Bend or to Lone Tree Bend, more correctly speaking——

Mr. DENMAN. How many hours?

Mr. HENGSTLER. I say suppose he had left four hours before.

Q. (continuing). How would he encounter the condition at Horseshoe Bend, would it be dangerous or would it be normal?

A. What was the stage of the tide at the point of departure?

Q. Had he left at high tide?

A. Was it what we call small high water or large high water?

Q. Well, let us say large high water?

A. Well, at the time he got to Lone Tree Bend it would be very swift ebb tide, *that is, for Napa Creek*, probably be running a mile and a half an hour, a mile or a mile and a half at the most."

Bennett, 185, 186.

To say unqualifiedly that a witness has stated that this was "very swift ebb tide", when the apostles show other bay tides of seven miles velocity (304) is hardly an exact summary of the testimony that it was "very swift ebb tide, *that is for Napa Creek*, probably be running a mile and a half an hour, a mile or a mile and a half at the most".*

The testimony receives the same treatment in the last brief filed by the appellant. At page 6 it summarizes the testimony of Bell on page 227 of the apostles, as follows:

"According to the arrangements that were made, Mr. Burgess, who loaded the barge for the Napa Gravel and Material Company, dispatched Lattimore (p. 227)."

Appellant's brief, p. 6.

What Mr. Bell actually said was as follows:

"Q. Now, this launchman got his instructions as to when to start, from the people who loaded the barge, did he not?

A. Yes, I think so, according to the arrangements that were made, that Mr. Burgess, who was doing the loading, dis-

* We do not question appellant's explanation that its designation of its own summary of several of its expert witnesses as a statement of Lattimore, the commander of the launch, was due to inadvertence. Further, we do not question that it was an inadvertence which omitted the important qualifying phrases after the words "very swift ebb tide". We are surprised, however, that after these unfortunate accidents on matters which go to the very essence of its case, the appellant's next brief should close with a censorious interpretation of its opponent's language entirely unwarranted by the context from which it was taken.

patched him. I don't know but probably they consulted together. We had no arrangement of that kind with Mr. Crowley, as to who should be the judge or who should dispatch the boat; the boat has to go up there and do the work.

Q. When there was a boatload ready for him, he would start with it down the river, when he was notified?

A. He could not start until the barge was loaded, and then how soon he would start after that, I should say *that was his matter, that he would use his judgment about that; that was his business the man in charge of the launch.*

Q. You don't know about that, however; *you don't know whether it was left to him or whether he was given instructions by anybody?*

A. No."

Bell, pp. 227, 228.

It is hardly an exact summary of Mr. Bell's testimony to say that Mr. Burgess dispatched Lattimore, when in fact Mr. Bell said he knew nothing about it, but that "it was his (Lattimore's) matter, that he would use his judgment about that; that was his business, the man in charge of the launch".

It is a strange thing, after all the discussion of the tide tables had at the hearing of the case, that the appellant's reply brief should not only not mention them, but should rely on a theory which escapes being a physical absurdity only on the assumption that the tide tables are incorrect by several hours.

It is elementary that courts (and a fortiori admiralty courts) take judicial notice of the movements of the tides, and the governmental tide tables are always admitted for that purpose.

In this case, it is not contradicted that the tables predicted high tide on the tenth of April at the Golden

Gate, outside San Francisco Bay, at 22:38 o'clock, or thirty-eight minutes past ten in the evening. Dr. Hengstler's objection that this is a mere astronomical *prediction* we will not attempt to answer, further than to suggest that the maritime enterprises of the whole civilized world rest on the infallibility of these official computations.

Nor is it contradicted that the tide is between two and three hours later in the upper waters of Napa Creek than at the Golden Gate, that is to say, it takes between two and three hours for the tidal crest to travel from the heads up over the rapidly shallowing depths of the bays of San Francisco and San Pablo, and through the narrows and turns of Napa Creek to its upper reaches. The testimony on this is as follows:

"Q. How do you utilize the tide in bringing the barges down?

A. We leave up there about high water at the heads down here. That gives us a start of two hours on the tide before the tide is high up there in Napa Creek.

Q. It takes two hours for the high water in the heads at San Francisco to reach up at Napa Creek. A. Yes, sir.

Q. You start at about high water at the heads?

A. Yes, sir.

Q. What is the purpose of that? Why do you want to have a little rising water in the creek?

A. In case of going over the Rocky Reach. That is what they call the Horseshoe Bend. We want to get over the rocks before the tide starts to fall."

Fisher, pp. 109, 110.

MR. DENMAN. Q. Don't you know it is customary for these gravel barges coming down there to come down on the ebb?

A. They usually start before high tide up there; generally start at high tide at the bar; that makes about two hours before high water up there."

Johansen, 153.

“Q. Are you familiar with the strip of Napa Creek known as Horseshoe Bend? A. Yes, sir.

Q. Do you know where it is? A. Yes, sir.

Q. Have you sailed through there a number of times?

A. Yes, sir.

Q. Now, what is the tidal difference between the Golden Gate and the upper portion of Napa Creek?

A. I should say about *three* hours, somewhere thereabouts.

Q. That is the calculation you have to make when you are going in?

A. The calculation of the setting tide, departing from Napa for us to get in high water coming down, we figure about three hours.

Q. So that if the high water at the Golden Gate was at 10:38 o'clock the high tide in the upper reach of Napa Creek would be 1:38?

A. About that.

Q. Suppose it was high tide in the upper reach of Napa Creek at 1:38, what would you say about the advisability of passing down through the Horseshoe Bend with a barge in tow between one and 2 o'clock on that morning?

A. The advisability of passing down between one and 2 o'clock?

Q. Yes, at that time. Suppose now, it is high tide in the upper reach of the creek at 1:38 and you are to take your barge through between one and 2 o'clock, what would you say as to that being a good or bad time of the tide to take it through?

A. I think that was a very practicable time to take it through,

Q. That is a proper time to take it through, is it not?

A. Yes, sir.”

Pigott, 201, 202.

Furthermore, the testimony is uncontradicted that for the first half of the ebb tide, the flow is sluggish and that the maximum is not reached till the mid edd tide.

“Q. What do you think the highest rate of tide you would be likely to strike would be in Horseshoe Bend?

A. I should judge maybe a mile and a half to a mile and three-quarters.

Q. A mile and one-half?

A. With a big run-up, I should judge that would be pretty close to it.

Q. That would be your maximum? A. Yes.

Q. At the middle of ebb tide or after, the highest rate of speed? A. Yes.

Q. But not before the middle of the ebb?

A. No, I don't think so.

Q. *The first three hours of the ebb the tide is rather sluggish there, isn't it?* A. *Yes.*"

Fisher, 313, 314.

To summarize, the uncontradicted facts are that it was high tide on this night at 10:38 at the entrance of San Francisco Bay and not earlier than 12:38 in the upper reaches of Napa Creek. That it was the custom in towing such lighters to leave upper Napa Creek on the high tide at the Golden Gate, and that it is the high tide *at the Gate* that they have in mind when fixing their departure from the upper gravel beds. That the purpose of leaving at this particular time was to pass over the Rocky Reach at high water in the creek, it being estimated that the tide would run from the Golden Gate to the Rocky Reach in about the same time that the lighter would come from the gravel beds to that point.

If then Lattimore had left the gravel beds at the proper time, he would have left at somewhere around ten o'clock in the evening, that is at high tide at the Heads. He would then have about two hours' time to reach Horseshoe Bend at high water and if he were delayed in any way en route, he still would have had

at least two hours' sluggish water, that is till after two thirty-eight, to make its passage.

The one fact about which all the parties to this case are agreed is that Lattimore started on his journey, traveled to Horseshoe Bend and was wrecked there some time between the hours of ten and two o'clock. As we have pointed out, the burden of proof was upon the appellant to show that the insurance company could establish a defense to this loss from stranding, and, while we think its proof weak, are willing to adopt its contention as to the time limits of Lattimore's actions.

Lattimore says that he started at about ten o'clock and that this was at or just before high tide. He does not say whether he meant high tide at the Golden Gate or at the gravel beds, but we know from the tide tables that he must have meant at the Golden Gate. His statement that "the further you come down the creek naturally the quicker you get the ebb tide" bears out the theory that he was looking for the crest and turn of the tide some time after he had started on his journey.

He says he proceeded very slowly without incident till he reached the bend. That is to say, he crossed the Rocky Reach, which is above the bend, at a time when the tide was sufficiently high to carry the six-foot draft of the lighter over it. In fact, the wreck occurred around the bend and some 700 or 800 feet below the rocks (189).

The best evidence, however, of the time that he went through the bend is the mute testimony of the lighter

herself. Our opponent's witness, Pinkham, tells us that he arrived on the scene the afternoon after the wreck and that the barge was pretty high up on the bank, just a little below high water mark. His testimony is as follows:

“Q. She was pretty high up on the bank at that time?

A. The barge?

Q. Yes.

A. Yes, she was, just a little below high-water mark.”

Pinkham, 298.

We thus have the evidence of the position of the barge as she lay wrecked, anchored by her gravel so she could not move (289), the evidence of the tide tables as to the hour of high tide at the Gate, the statement of all the witnesses on the retardation of the tide in Napa Creek, and Lattimore's testimony, both as to the time of his departure and the time of the wreck, all agreeing that the passage of the Horse-shoe Bend was attempted at the proper time, namely, at just about, or a little after, high tide in the sluggish water which continues till at least three hours after the crest of the flood.

Certainly this cannot be called a wilful wrecking on Lattimore's part and a fortiori not wilfulness on the part of the insured steamship company between whom and Lattimore stood the charterer Bennett & Goodall, the sub-charterer Napa Gravel & Material Company, and the independent contractor, Crowley. At the most it was simple carelessness in underestimating the force of the tide (if it had any) at the very beginning of the

sluggish ebb. There is no reason why Lattimore's explanation that something broke his propeller before the wreck should be disregarded, as it is entirely uncontradicted and is reiterated by him, but, as suggested, even if we do, the uncontradicted evidence shows at most mere ordinary negligence.

Even overlooking altogether the positive testimony of respondent's gasoline launch experts and accepting the statements of appellant's steamboat men absolutely and assuming the facts at their worst, which with the burden on the appellant we should not do, the case does not compare in negligence with *Orient Ins. Co. v. Adams*, where the United States Supreme Court said:

“The mere fault or negligence of the captain of the vessel by which the ‘Alice’ was drifted into the current and drawn over the falls, *will not constitute a defense for the company*, unless the jury should be satisfied that the captain acted *fraudulently or wilfully, with design* in so doing.”

Orient Mut. Ins. Co. v. Adams, 123 U. S. 67 and 72 et seq.

In that case the facts are stated as follows:

“The master of The Alice was C. F. Adams, one of the assured, and a son of the other plaintiff. Before the sailing of the vessel he had the reputation of being a ‘drinking’ man, and of that fact his father was informed. On her arrival at Louisville, on the morning of April 28, 1880, the master gave the usual signal (which was transmitted to the engineer) that he had no present need of the engines.

“The joint of the mud valve was out of order, threatening damage to the freight, and making repairs necessary. The steam was thereupon blown

off in order to make repairs. The captain, coming on board, saw that repairs were going on, and knew that the mud valve connected with the boiler needed repairs. The work of repairing made it necessary to blow off steam. The captain subsequently went on deck, and, without making inquiry of the engineer as to the condition of the steam or receiving any notice from him that steam was ready, tapped his bell at about 8:30 A. M. as a signal to let go the boat.

“At that time there was not sufficient steam to propel the vessel. It is the custom of the river for the master, before giving the order to let go, to inquire of the engineer as to the condition of the steam and await his reply that the steam is ready before giving the order to let go. At the time of the accident the vessel was in a position to be carried over the falls, if she was let go without steam on. Upon being let go she was carried by the current down the river and over the falls and, striking a pier, was badly damaged; in consequence of which she sunk soon thereafter below the bridge in about eighteen feet of water.”

Orient Mut. Ins. Co. v. Adams, 123 U. S. 67 at 69.

The court goes on to say:

“But it is insisted that the court should have granted the request of the company to the effect that it was not liable if the accident and loss were caused by the ‘misconduct’ of the master. Had that request been granted, in the form asked, the jury might have supposed that the company was relieved from liability if the master was chargeable with what is sometimes described as *gross negligence* as distinguished from simple negligence. Hence the court properly said, in effect, that the misconduct of the master, *unless affected by fraud or design*, would not *defeat* a recovery on the policy.

“The principle upon which the court below acted was that expressed by Chief Justice Gibson in

American Ins. Co. v. Insley, 7 Pa. 229, when he said that 'Public policy requires no more than that a man be not suffered to insure against his own knavery, which is not to be protected or encouraged by any means; for though the maxim respondeat superior is applicable to the responsibility of a master for the acts of his servants, yet the insured, so long as he acts with fidelity, is answerable neither for his servants nor for himself'."

Ibid, p. 73.

As was said above, in order to defeat the appellant's right to recover, the insurance company must establish its defense that Lattimore acted not alone with reckless negligence but with *fraud* and *design*. There is not a line of testimony to show fraud or design on Lattimore's part, or on the part of anyone connected with the litigation. No motive for a wilful wrecking of the barge anywhere appears.* No one had any insurance on her save the appellant, and, difficult as it is at times to determine whether it is the insurer or the insured who is speaking through the appellant's counsel, we of course do not find the appellant urging its own wrongful wrecking to secure insurance moneys, to defeat its right to recover on its insurance.

We submit that the wreck was a "happening caused by the appellant's present policies of insurance", and that Lattimore's negligence, if any, was not such a "cause as would permit our underwriters to successfully defend paying the face of the policies".

* There was no early spring market for gravels such as caused the captain in the first Nome Beach opinion to rush into the ice pack. The navigation, on the other hand, was in the usual course, just as in the second Nome Beach case. *Standard Marine Co. v. Nome Beach*, 133 Fed. 636; *Ibid.*, 167 Fed. 119.

II.

As Evidence of Both Sides is Overwhelming That Launch Had Power to Navigate the Creek at Certain Stages of the Tide, the Lighter Was Seaworthy and, Even if There Were Neglect in Attempting to Pass Horseshoe Bend at the Time in Question, it Would Not be Attributable to the Charterer or Sub-Charterer, Much Less to the Insured Owner, as Lattimore Was Beyond Their Control.

We have heretofore showed that on the whole evidence Judge Bean's finding that at most Lattimore's acts were simple negligence is sustained. Our opponent urges that this is not a finding of fact, but a conclusion of law. It is submitted that its contention is elementarily wrong.

In this case we have shown that the loss was by a peril of the sea. The appellant (as also the insurance company) has an affirmative defense* that the insured acted wilfully with "fraud or design". The case goes

* To the decision of the Supreme Court in *Orient Ins. Co. v. Adams*, supra, and other cases in our opening brief should be added the leading case of *Tidmarsh v. Washington Ins. Co.*, 23 Fed. Cases, 1197, where, on appeal to the Circuit Court, Judge Story said:

"If, upon the whole evidence, the case hangs in great doubt upon any point, then the party, whose duty it is to satisfy your minds beyond a reasonable doubt on that point, having failed to establish it, must, to that extent, surrender his right to a verdict. Now, upon the three points of misrepresentation, negligent navigation, and deviation, my opinion is, that the **burthen of proof rests on the defendant**. Each of them constitutes a **substantial ground of defense**, in respect to which the plaintiff is not to prove the negative, but the defendant is required to establish the affirmative. So far indeed as the plaintiff's own proofs let in or assist such a defence, they are fairly before the jury to weigh as far as they may; but beyond these the defendant must satisfy your remaining doubts, or the defence miscarries."

Tidmarsh v. Washington Fire & Marine Ins. Co., 23 Fed. Cases, 1197 at 1198.

to trial on this issue and the court finds that if there is any negligence it is simple negligence not amounting to fraud or design. How this can be transmuted into a conclusion of law is beyond our understanding. The disputed question is as between the fact of wilfulness and the fact of ordinary negligence. The court finds the fact to be not wilfulness but ordinary negligence, if any negligence at all. Ergo, says our opponent, the court drew a conclusion of law.

Our opponent urges that we must ignore Judge Bean's finding that there was an absence of wilfulness on the part of the insured because he may have disregarded an alleged statement of Lattimore's, given as an excuse to a stranger the day after the accident, to the effect that he had complained "that the barge was too unwieldy to handle with that tow boat". A plain answer to this is that Judge Bean did admit this evidence over our objection (292), and the court is bound to presume that he considered it in making up his opinion.

However, even presuming that he did not consider the evidence which was before him, and the matter is one for consideration here *de novo*, the statement would have no weight in view of the overwhelming preponderance against it. In the first place it does not even appear to whom the complaint was made, whether to his employer, Crowley, to the Napa Gravel Company, or to some other person.

In the second place, this unsworn statement, made when Lattimore was moored next the barge as she lay wrecked on the bank, and when he would be likely

to be seeking to excuse himself from any charge of negligence, is squarely contradicted by all the launchmen who had handled or seen other lighters, some larger and more unwieldy, customarily handled in this stream and similar tidal creeks, by launches of no greater power than Lattimore's.

See testimony of Fisher, Johansen, Bennett and Piggott, summarized on pages 18, 19 and 20 of our opening brief, and of our opponent's witness Young, who says that in a tidal flow of two knots, which is more than the maximum in Napa Creek (313), there would be no trouble in handling the lighter, though he questioned the power of the tug to handle them in work around the wharves in the bay where the tide reached seven knots per hour.

When we examine Lattimore's testimony given under oath, we find no complaint about the power of the launch. On the contrary, he says that, in his opinion, if the propeller had not been broken before he collided with the lighter, the accident would not have occurred, and even had the vessel gone ashore, he would have been able to pull her off (338, 339). He tells us that the "kick" he made was for an extra man on the lighter, and quite possibly she would be more wiely with such a man to adjust her bridle. But his kick was successful and the extra man was put on, who, Lattimore says, was ample (343). Surely his sworn testimony as to his power and as to procuring all the help he asked for, and the testimony of all these launchmen as to the efficiency of the launch outweighs the excuse he is reported to have offered when alongside his

wrecked lighter and explaining his predicament to a casual enquirer.

Disregarding for the sake of argument all respondent's testimony and taking the testimony of appellant's witnesses as to the power of the lighter at its very worst, it is that it was insufficient at certain conditions of the tide. Even the most prejudiced of our opponent's witnesses admit that the launch could have towed the lighter down at other periods in the tidal flow. For instance, the appellant's witness Pinkham, the steamboat man, says:

“Q. A large lighter of the size of that lighter, and fully loaded, to tow that large lighter around Horseshoe Bend at a dark night, with the falling tide?

A. *Not with a falling tide, not with an ebb tide.*

Q. Why not, Captain?

A. Well, because if he started to tow that with that launch, 600 tons, he would never keep her off the bank with that launch.

Q. *Is that the only reason why it would not be safe, or is there any other reason?* A. *No other reason that I can see.”*

Pinkham, p. 295.

“Q. *You think he should have handled it on some tides and not on others; is that it?* A. Yes.”

Ibid, 297.

Hatt, our opponent's witness, admitted on cross-examination that these launches were proper for towage around the bend before the ebb and that the danger consisted in not passing it before the falling of the tide. That is to say, in his opinion, if Lattimore had anchored after passing the rocks and before the bend

and waited for slack low water before proceeding, he would have been perfectly safe.

Hatt, 250, 251.

Bell, a steam tug man, also our opponent's witness, admits the efficiency of the tug to make the bend if not used in the ebb tide.

"A. The danger of an ebb tide has a tendency to swing you in to the bend.

Q. You do not know, you are not in a position to state what that character of launch will do yourself? A. No, sir.

Q. Then, it is a question of the skill of the man in handling a launch in coming round those turns, providing there is water enough? A. Yes, sir."

* * * * *

"Q. What do you say would be the proper time before high tide to leave a mile below the Asylum wharf, to bring down such a barge as Dr. Hengstler has described? What time should you leave before high tide?

A. I should want to leave an hour or an hour and a half before high water.

"Redirect Examination.

"MR. HENGSTLER. Q. How long would it take, on an average, a launch with a loaded lighter in tow, to get from the Asylum wharf to the place where this lighter went ashore?

A. With a description of 50 horse-power that you speak of?

Q. Yes.

A. I should judge that would be according to how the barge was loaded, how deep she was.

Q. If she was fully loaded?

MR. DENMAN. Drawing 6 feet. That is the testimony.

A. Drawing 6 feet?

Q. Yes.

A. I should judge from the Asylum wharf to Suscol—

MR. HENGSTLER. Q. No—, to the Lone Tree Bend.

A. From the Asylum wharf?

Q. Yes, from the Asylum wharf.

A. That had not ought to take her over an hour.

Q. It ought not to take her over an hour?

A. It had not ought to take her over an hour."

Bell, 257, 258, 259.

F. H. Cruthers, a steamboat man who was "actually prejudiced against gasoline tugs", says that the launch in question could properly have taken the lighter around the bend if she had dropped behind the lighter and let her down through. That is to say, there was power enough if Lattimore had used better judgment in handling the lighter when he reached the bend. He says:

"Q. Now, Captain, do you think that the gasoline launch of 50 horse power having this lighter, this large lighter fully loaded in tow, is safe in turning one of those bends on Napa Creek like the Lone Tree Bend? A. Safe?

Q. Yes. A. I do not, not on the ebb tide.

Q. Not on the ebb tide. Why not, Captain?

A. Because the barge would go into the bend, I don't think she could swing her out—the lighter would go into the bend, I don't think he would have power enough to swing her out; I think he ought to drop behind, drop the barge down, and let the current take her, and if he saw the barge going over he could back up a little bit.

Q. Would that be a perfectly safe method for a gasoline launch?

A. That looks to me like it; that is the way I would do it."

Cruthers, p. 278.

The importance of this testimony of these four adverse witnesses and of our five experts is that it conclusively proves the launch and tow were seaworthy as to power. They were a practicable combination for towing on the creek at a proper condition of the tide. It was a mere matter of judgment of the master whether the tidal conditions were or were not proper to continue after the bend was reached. If the conditions

were not right, it was the duty of the master to anchor, just as we find the master of the powerful steam stern wheeler "Napa City" doing the day after the wreck of the barge. Pinkham, her master, tells us he waited for several hours for a change of the tide (300).

The court will take judicial notice of the fact that all these tidal creeks are navigated by flat-bottomed sailing scow schooners. In sudden calms they are *left entirely without power at all* to move, yet it never has been contended that they are therefore unseaworthy. All the locomotion they then have is by long poles in the hands of the crew. If the tides are not right they anchor and await proper conditions.

The testimony is that these lighters were loaded by the sub-charterer by day and moved by Crowley's man at night. As we have seen, Mr. Bell did not know whether any instructions had in fact been given regarding the time of departure, but if there had been they were not binding on Crowley's man.

"Q. And this man Lattimore was in charge of the navigation and handling of the barges?

A. We had nothing directly to do with Lattimore, he was put on there by Crowley, and my recollection is we paid Crowley \$30 a day, although it might have been \$25 a day."

* * * * *

"A. The two men on the launch were not in our employ.

Q. They were not in your employ? A. Not at all.

Q. That is technically speaking? A. Oh, no.

Q. They were working for you, were they not?

A. No, they were not; Crowley, an independent contractor, was to furnish the launch and its two men at so much per day.

Q. You are speaking as a lawyer, but as a matter of fact they were working at your business, and for the purpose of your business were they not?

A. Yes, but we would not have the right to give them any orders as to the operation of that launch.

Q. Now, how about the third man that was on the barge?

A. He was our man; his name was F. Johnson."

Bell, 220, 221, 234.

But even had the Napa Gravel Company directed the leaving time at the gravel beds, there is not a word of testimony to the effect that Lattimore was ordered that if he arrived at any bend of the river at a wrong period of the tide he was nevertheless to take the risk of making its passage. The navigation after leaving the gravel beds was in the hands of Crowley's man, and it was a matter of his judgment taking into consideration the amount of power at his disposal, whether at any particular time he should anchor or continue his towing. It is against risks of loss from perils of the sea resulting from just such mistakes in navigation that insurance policies are issued.

To summarize: Our opponent urges that the lighter was unseaworthy because the launch had not enough power to handle her in all tides. Our answer is that all vessels towing on Napa Creek, no matter how powerful, have to anchor and await favorable tides, and that it is a mere matter of judgment what position of the tides one will use with the power at his command. The large scow schooners navigate these creeks without

any power at all in calm weather, using gentle tides and poles and anchoring at unfavorable times.

Our opponent urges that the Napa Gravel Company sent the vessel out on the wrong period of the tide. Our answer: First, that the testimony does not support the claim that the Napa Gravel Company chose the time of departure, but on the contrary the testimony is uncontradicted that Lattimore was acting under the independent contractor Crowley. Second: that even if the Napa Gravel Company had dispatched the lighter at the time in question, it was the proper time for such towage, namely, high water at the heads. Third: even if the Napa Gravel Company had dispatched the lighter, this does not make them responsible for Lattimore's failure to anchor if he arrived too late to make the bend in safety and erred in judgment in attempting to pass it.

Our opponent urges that on reaching the bend it was wilfulness to attempt to pass. Our answer is that there is nothing to sustain the appellant's burden of proof in this regard, but that on the contrary the position of the wrecked barge and all the testimony shows the accident occurred at the beginning of the ebb, when at most it was mere negligence and not even "gross negligence", much less the "misconduct affected by fraud or design" which is necessary to defeat the policy.

III.

The Charterer May Exempt Himself by Such Provisions as Here Made From the Consequences of Negligent Towage by an Independent Contractor.

Appellant in his reply still insists that *Gannon v. Ice Co.*, 91 Fed. 539, is applicable to the case at bar and cites the syllabus and the following language of the judge:

“The appellant could not absolve itself from its duty as bailee to take proper care of the boat by delegating that duty to another. The hirer of property is liable, not only for his own personal default or negligence in its custody, but also for that of any other person whom he permits to use it. *Schouler Bailm.*, sec. 145; *Story, Bailm.*, sec. 400.”

The brief nowhere states what is plain from the examination of the report, that in that case there was no agreement as here exempting the charterer from loss by negligent navigation of third parties over whom they have no control. The same thing is true of *Winslow v. Thompson*, 134 Fed. 546, 130 Fed. 1001, 128 Fed. 73, where the only exception in the charter was sea peril. Such an exception in a charter does not cover negligent navigation unlike policies of insurance where it is covered in assuring the risk of perils of the sea. There is no exception covering negligence in any of the cases cited under this head in our opponent's brief.

We do not question that a charterer with no exemptions of liability is like any other bailee. He is liable

for the negligence of a person whom he has made his sub-bailee. But this has no bearing on a bailment where the bailor expressly exempts the bailee from liability from any loss covered by the bailor's insurance against which the insurance company cannot defend, and that insurance covers a loss by perils of the sea caused by negligent navigation of a third party.

In the case at bar, the neglect, if any, was that of an independent contractor employed by a sub-charterer who had taken possession from the charterer with the consent of the owner. There is no case holding that under such conditions it is *contra bonos mores* for the charterer to agree with the owner that he shall not be liable for the negligent navigation of either the sub-charterer or the towing contractor, over neither of whom he has any control. That the contrary is the law we believe our opening brief clearly establishes.

IV.

The American-Hawaiian Steamship Company's Relation to Its Insurers.

For some unexplained reason the appellant in the last page of its brief shows extreme sensitiveness on this phase of the case, and cavils at us for even suggesting there may be a relationship between it and its insurers which may make their interests indetical here. It forgets that from the beginning we have taken this position in both our pleadings and assignment of error, i. e., that the burden was on the appellant

to show that there has been a demand and refusal to pay the policies and that the loss was not one on which the companies were unable to defend because, for instance, they had admitted liability.

It is argued by respondent Bennett & Goodall in the court below and may well be urged here that the insurance ran to the libellant; it alone could demand from the insurers the face of the policies; it alone could enforce payment by action; it alone could receive payment or refusal of payment—therefore upon it must necessarily lie the burden of proof in this regard. From the inception of this case to now, even after proof of loss of the lighter while navigating a tributary of San Francisco Bay, not a word comes from appellant to show whether it ever presented a proof of loss to the insurer; whether it ever asked for payment of the policies, whether it ever received a refusal of any demand made or the grounds thereof; whether it ever instituted any action in the years that have passed since the lighter's loss to collect the insurance; whether the insurer resisted payment or successfully or otherwise defended against paying the face of the policies, or whether it has not already received full payment, stultifying its contentions that the insurers might have defended a claim or suit if made or instituted. In view of the language of the charter, making Bennett & Goodall responsible for losses against which the insurers could successfully defend against paying the face of the policies and certainly after proof of loss at sea while upon its contemplated business, good faith, as well as the burden of proof, demanded that appellant

show what efforts were made to realize upon the policies.

Under Judge De Haven's ruling, we were shut out from inquiry along this line, but our assignments of error, which we think our courteous opponent has overlooked, would seem to warrant our touching on it in this tribunal.

ANSWER TO BRIEF OF AMERICAN BONDING COMPANY.

—

If Bennett & Goodall is Liable, Then American Bonding Company is Liable, as Accident is the Only Pertinent Exception of Its Bond.

The Napa Gravel Company does not question that it is liable for the loss of the barge if Bennett & Goodall is liable. The American Bonding Company, which guaranteed the return of the lighter clearly occupies the same position.

The only exception to the Bonding Company's liability is

“Provided, however, that the surety shall not in any event be liable for the payment of any damage or loss coverable by policies of insurance insuring said barges against damage or loss *by accident* or fire.”

Apostles, p. 59.

Taking this exception at its plain meaning, it leaves the bonding company liable to Bennett & Goodall for the loss of the barge unless it was a risk not coverable by a policy against *accident*.

It is elementary that the word “*accident*” is by its very essence opposed to wilful acts. Bouvier defines “*accident*” as follows:

“*ACCIDENT* (Lat. *accidere*,—ad, to, and *cadere*, to fall). An event which, under the circumstances, is unusual and unexpected by the person to whom it happens.

“The happening of an event without the concurrence of *the will of the person by whose agency*

it was caused; or the happening of an event without any human agency. The burning of a house in consequence of a fire made for the ordinary purposes of cooking or warming the house is an accident of the first kind; the burning of the same house by lightning would be an accident of the second kind."

Bowyer, p. 61.

Webster defines it as:

"An event that takes place without one's *fore-sight* or expectation; an effect that proceeds from an unknown cause, or is an unusual effect from a known cause and is hence not expected."

It is thus apparent that if the court should sustain the position of the American-Hawaiian Steamship Company and hold that the lighter was lost by wilfully taking the risk of Horseshoe Bend with insufficient power for the stage of the tide, or wilfully dispatching her to take such a risk, then the bonding company is liable. Neither cause for the loss falls within the word "accident".

The California law has codified this distinction between wilful and other acts in section 2629 of the Civil Code, in which the insurer is held exempt from liability for wilful acts, as follows

"NEGLIGENCE AND FRAUD. An insurer is not liable for a loss caused by the *wilful act* of the insured; but he is not exonerated by the negligence of the insured, or of his agents or others."

Civil Code, § 2629.

and in section 2622, classifying the acts of a bailee, as here the Napa Gravel and Material Company, as between wilful and other classes of acts.

It is thus apparent that in the event that Bennett & Goodall are held liable on the ground that the loss was from a wilful act and not an accident, the bonding company must also be held liable.

Indeed, it may be urged even further than this that the words "policies insuring said barges against damage or loss by *accident* or fire", as used in this bond, do not include marine insurance at all. The bond was prepared by the bonding company and in case of ambiguity should be construed most strongly against that company.

Van Jandt v. Hanover Bank (C. C. A.), 149 Fed. 127;

Wilson v. Cooper, 95 Fed. 625;

Noonan v. Bradley, 9 Wall. 394.

In the realm of insurance, to which this bonding company belongs, "accident insurance" and "fire insurance" are something entirely different from "marine insurance" covering losses from perils of the sea, etc. The State of California has based its insurance laws on this fundamental distinction of the insurance business. Section 594 of the Political Code divides all insurance into fourteen classes, the second of which is "fire", the third "marine" and the sixth "accident". The latter term covers only accidents to persons and is as follows:

"6. ACCIDENT INSURANCE, and either sickness or health insurance, including insurance against injury,

disablement or death resulting from traveling or general accident, and against disablement resulting from sickness, and every *insurance appertaining thereto*."

Political Code, § 594, Sec. 6.

Construing the bond against the company which drew it, it is clear that it excepts those "insurances appertaining to" injuries to persons. That is to say, the exception excludes only the loss of the vessel from seizure in a suit in rem by one of the crew for injuries arising from an *accident* to him caused by the act of her owners. Such a construction brings the loss of the lighter by her wrecking without the exception under any theory of the case.

The word "coverable" in the excepting clause is of course limited by the words "policies insuring against * * * accident" and does not add anything to the number of risks excepted by this clause.

However, whether or not the word accident be used in this limited sense, at most it cannot mean more than an accident to the ship caused by negligence, whether ordinary or gross, in which event, under *Orient Ins. Co. v. Adams*, supra, the appellant steamship company must look to its policies on the lighter and not to Bennett & Goodall.

We are seeking relief against the Napa Gravel Company and the American Bonding Company only in the event we are held liable to the appellant, and our fortunate position is that either the appellant's insurance companies are ultimately liable or the bonding company. This result of the analysis of the legal relationship of

the parties tallies with the common sense purpose of the business men engaged in the transaction, i. e., that Bennett & Goodall should be covered by the steamship company's insurance for any loss within these policies, which means whether or not negligently caused, and that for acts wilful and not accidental in their nature, the sub-charterer (over whom neither the steamship company nor the charterer had any control) and its bondsmen should be liable.

EDWIN T. COOPER,
 WILLIAM DENMAN,
 DENMAN & ARNOLD,
Proctors for Bennett & Goodall,
Appellee and Cross Appellant.

No. 2230

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN-HAWAIIAN STEAMSHIP

CO. (a corporation),

Libelant and Appellant,

VS.

BENNETT & GOODALL (a corporation),

Respondent and Appellee.

PETITION FOR REHEARING

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellant respectfully asks for a rehearing of this cause.

As stated in our argument on this appeal, we realize that the points involved are not simple, and that, after the decision of the lower Court, the danger of considering this case as one involving insurance law could only be overcome by the most careful presentation and the closest consideration of the vital questions. We have not succeeded in

putting these questions in their proper relief, but hope that the Court will bear with us in our further endeavor to show that the contract in this case is one defining the liability of a *charterer* for his acts and omissions. It does not seem to us reasonable to interpret the language used between the parties as practically amounting to this:

(a) You are an insurer of this barge.

(b) But you may be negligent in its use and handling.

We respectfully request the Court to give further consideration to the following points, suggested by the opinion and condensed within the narrowest compass:

1. It is true that a common carrier may make a valid *contract of insurance* for protection against the consequences of his own negligence.

2. It is also true that a common carrier may lawfully stipulate with the owner of the goods *to be allowed the benefit of the insurance obtained by the owner.*

(*Phoenix Ins. Co. v. Erie Transp. Co.*, 117 U. S. 312.)

3. *But* a stipulation of the carrier with the owner of the goods to be allowed the benefit of the owner's insurance is *quite another thing from* a stipulation respecting insurance which in effect relieves the carrier from liability to the owner for loss caused by the carrier's negligence.

A stipulation of the first kind is valid (*Phoenix Ins. Co. v. Erie Transp. Co.*, 117 U. S. 312), whereas a stipulation of the second kind is void (*The Seaboard*, 119 Fed. 375, and cases there cited). From the fact that a stipulation of the first kind is made it does not follow, therefore, that a stipulation of the second kind is implied. It follows, on the contrary, that the stipulation of the second kind is neither intended nor made. Suppose an *owner of goods* had made a contract with a *carrier* that the latter must return them in as good order and condition as when he received them, "happenings covered by the present policies of insurance excepted"; could it be said that the meaning of this language is to exempt the carrier from liability for loss caused by the negligence of the carrier?

4. If, in the case of a common carrier using, in his contract with the owner of goods, the exact language used in the case at bar, this Court would come to the conclusion that the clear meaning of the language used is, *not* to exempt the carrier from loss caused by negligence, we submit that the same language used in this case, as between the owner of the barge in suit and its charterer, should not receive a different construction. If the loss of goods could *not* be expressly excepted from the obligations imposed upon the carrier, had the contract between carrier and owner used the identical language used in this case, it is clear that the loss here involved cannot be said to be *expressly excepted*

from the obligations imposed upon Bennett & Goodall by this same language.

5. This Court finds that the lighter in question, if operated at all, had necessarily to be moved by independent means to be employed by the charterer or by such other party as might acquire the right to use it. The charterer was clearly responsible for furnishing adequate means for operating the lighter. In this respect the charter in question is different from an ordinary charter. The relation between the owner of a powerless vessel, and the charterer thereof, imposed upon the charterer a care in the handling of the vessel analogous to that imposed by law upon the carrier handling the powerless goods of the absent owner. Even if it was intended to make a stipulation that the party controlling the powerless property should not be liable for a loss caused by negligence, such a stipulation should be declared contrary to public policy in either case.

6. An additional reason why such a stipulation should be declared to be contrary to public policy is that the stipulator in this case who would agree that the authorized user of his property may use it negligently, takes no risk or burden upon himself, but throws the risk and burden attendant upon such a stipulation upon an innocent third person who alone ultimately suffers from it, but is not consulted relative to the stipulation.

7. The fact that, in this case, the right to use the lighter passed, by the consent of the owner of

the vessel, by sub-charter to a third party, can have no bearing upon the questions involved in the case.

True that, by virtue of that consent, the bailee or hirer of the lighter, Bennett & Goodall, had the right to re-bail the lighter; but there is no evidence that, by giving consent thereto, the owner intended to or did relieve the hirer from any responsibility for the negligence of the sub-hirers. As a matter of law, the hirer is ultimately responsible to his letter for the injurious acts of those whom he voluntarily admits into the use of the thing. "And this responsibility applies not to technical servants or one's sub-agents employed about the thing only, but to *all such as the hirer may allow to participate in the benefit he enjoys*" (*Schouler, Bailments*, Sec. 145; *Smith v. Bouker*, 49 Fed. 954).

8. Petitioner respectfully begs to call the Court's attention to *Assignment of Error No. 12* (Ap. p. 365), upon which the Court has made no ruling. It is submitted that the items taxed as costs to the Napa Gravel & Material Company, and the American Bonding Co., who were made parties to this proceeding on petition of respondent, cannot be allowed, for the reasons stated in the brief for appellant, on pages 57 to 59. The admiralty rules of the Southern District of New York are our rules; the case of *The Charles Tiberghien*, 148 Fed. 1016, decided under these rules, is decisive on this point.

Respectfully submitted,

LOUIS T. HENGSTLER,
*Proctor for Libellant, Appellant
 and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for libelant, appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

LOUIS T. HENGSTLER,
*Proctor for Libelant, Appellant
and Petitioner.*

United States
Circuit Court of Appeals

For the Ninth Circuit.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Idaho, Northern Division.

FILED
JAN 23 1913

No. 2238

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys.]

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Messrs. HAMBLÉN & GILBERT, Spokane, Wash-
ington,

Attorneys for Plaintiff in Error.

C. H. LINGENFELTER, Esq., Boise, Idaho,

Attorney for Defendant in Error.

*In the District Court of the United States Within
and for the District of Idaho, Northern Divi-
sion.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Complaint.

Comes now the plaintiff, the United States of America, by C. H. Lingenfelter, United States Attorney for the District of Idaho, acting in this behalf by the direction of the Attorney General of the United States, and complains of the defendant, The Oregon-Washington Railroad & Navigation Company, and alleges:

I.

That at all times hereinafter mentioned the Oregon-Washington Railroad & Navigation Com-

pany was and is a corporation organized and existing under and by virtue of the laws of the State of Oregon engaged in business as a common carrier in interstate commerce, and operating a line of railroad extending from the State of Oregon into the States of Washington and Idaho.

II.

That said railroad forms a part of a line of road over which passengers and freight, including mules, horses, cattle, sheep, swine and other animals, are conveyed between, into and through the states hereinbefore mentioned. [1*]

III.

That heretofore, to wit, on or about the 6th day of February, 1912, the defendant, the Oregon-Washington Railroad & Navigation Company, received at Wallace, Idaho, for shipment to Osborne, Idaho, certain swine, to wit, one carload consigned by Albert May to F. A. Stevens; that said stock was received at Wallace, Idaho, from the Northern Pacific Railroad Company, a corporation, and that said stock was loaded at Stevensville, Mont., on February 5, 1912, at 12:15 P. M. mountain time on said *said* Northern Pacific Railroad Company on the following car, to wit, N. P. 90,515; that said defendant received said shipment of stock at Wallace, Idaho, with knowledge that the same was loaded at 12:15 P. M. mountain time on February 5, 1912, at Stevensville, Mont., as aforesaid, and thereupon the said defendant conveyed said stock on its line aforesaid as a common carrier in the same car aforesaid to its station at

*Page-number appearing at foot of page of original certified Record.

Osborne, Idaho, at which place the said stock was unloaded at 7 o'clock A. M. Pacific Time on the 7th day of February, 1912, the said stock having been continuously confined in said car from the time of their receipt by the said Northern Pacific Railroad Company, and while in transit over the lines of said defendant to the time of the unloading as aforesaid at Osborne, Idaho, without food, water, rest or unloading, a period of 43 consecutive hours and 45 minutes.

IV.

That from the time said animals were first loaded at Stevensville, Mont., as aforesaid, and from the time they were received at Wallace, Idaho, by this defendant as aforesaid, said animals had been continuously confined in the said car without unloading, feeding, watering or resting, knowingly and wilfully by the said defendant for a longer period than 28 consecutive hours, to wit, for a period of 43 consecutive hours and 45 minutes. [2]

V.

That by reason of the foregoing, the said defendant became and was and now is liable to the plaintiff, the United States of America, as penalty in the sum of Five Hundred Dollars.

WHEREFORE, the plaintiff demands judgment against the said defendant for the sum of Five Hundred Dollars, together with costs and disbursements of suit.

C. H. LINGENFELTER,

United States Attorney for the District of Idaho,
and Attorney for Plaintiff Residing at Boise,
Idaho. [3]

State of Idaho,
County of Ada,—ss.

C. H. Lingenfelter, being first duly sworn, on oath deposes and says that he is the United States Attorney of the District of Idaho, and as such makes this affidavit for and on behalf of the plaintiff; that he has read the above and foregoing complaint and knows the contents thereof, and that he believes the facts stated in said complaint to be true.

C. H. LINGENFELTER.

Subscribed and sworn to before me this 10th day of April, 1912.

A. L. RICHARDSON,
Clerk of the United States District Court.

[Endorsed]: Filed April 10, 1912. A. L. Richardson, Clerk. [4]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

No. 438.

THE UNITED STATES OF AMERICA

vs.

THE OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation.

Summons.

The President of the United States to The Oregon-Washington Railroad & Navigation Company, a Corporation, the Above-named Defendant,
Greeting:

You are hereby commanded to be and appear in the

above-entitled court, holden at Coeur d'Alene in said District, and answer the complaint filed against you in the above-entitled action within twenty days from the date of the service of this Summons upon you, if served within the Northern Division of said District, or if served within any other Division of said District, then within forty days from the date of such service upon you; and if you fail so to appear and answer, for want thereof, the plaintiff will apply to the court for the relief demanded in the complaint, to wit:

For judgment in the sum of Five Hundred Dollars, together with costs and disbursements of suit.

The facts more fully appearing in plaintiff's complaint, a certified copy of which is served herewith, hereby referred to, and made a part hereof.

And this is to COMMAND you, the MARSHAL of said district, or your DEPUTY, to make due service and return of this Summons. Hereof fail not.

Witness the Honorable FRANK S. DIETRICH, Judge of the District Court of the United States, and the seal of said Court, affixed at Boise in said District this 11th day April, 1912.

[Seal] A. L. RICHARDSON,
Clerk.

U. S. Attorney, Boise, Idaho, Attorney for Plaintiff.

[Endorsed]: No. 438. In the District Court of the United States, for the District of Idaho, Northern Division. The United States of America vs. The Oregon-Washington Railroad & Navigation Company. Summons. Returned and filed April 29th, 1912. A. L. Richardson, Clerk. [5]

Marshal's Return on Summons.

This is to certify that I received the within Summons, together with a certified copy of the complaint at Lewiston, Idaho, on the 15th day of April, 1912, and served the same on The Oregon-Washington Railroad & Navigation Company, a corporation, on the 16th day of April, 1912, at Lewiston, Nez Perce County, Idaho, by handing to and leaving with C. W. Mount, agent of The Oregon-Washington Railroad & Navigation Company, a corporation, a duplicate of the within summons, together with a certified copy of the complaint.

Dated April 16th, 1912.

S. L. HODGIN,
U. S. Marshal.
By Wm. Schuldt,
Deputy. [6]

*In the District Court of the United States Within
and for the District of Idaho, Northern Division.*

No. 438.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Answer.

Comes now the defendant, the Oregon-Washington Railroad & Navigation Company, and for answer to

plaintiff's complaint admits, denies and alleges as follows, to wit:

I.

Admits the allegations contained in paragraph one of the complaint.

II.

Admits the allegations contained in paragraph two of the complaint.

III.

For answer to paragraph three of the complaint, defendant alleges that it has no knowledge or information sufficient to form a belief as to whether any or either of the allegations contained therein are true and therefore denies the same and the whole thereof, except that defendant admits that it received from the Northern Pacific Railway Company at Wallace, Idaho, a shipment of hogs, consigned by Albert May of Stevensville, Montana, to F. A. Stevens at Wallace, Idaho; [7] that the said destination was later changed to Osborne, Idaho, admits that said shipment was loaded into N. P. car No. 90,515; admits that this defendant transported this shipment from Wallace to Osborne, Idaho.

IV.

For answer to paragraph four of the complaint, defendant alleges that it has no knowledge or information sufficient to form a belief as to whether any or either of the allegations contained therein are true and therefore denies the same and the whole thereof.

V.

Denies each and every allegation contained in paragraph five of the complaint.

WHEREFORE having fully answered plaintiff's complaint, defendant demands that this action be dismissed and it have and recover its costs and disbursements herein.

A. C. SPENCER,
FRED E. BUTLER,
W. A. ROBBINS,

Attorneys for Defendant. [8]

State of Oregon,

County of Multnomah,—ss.

James G. Wilson, being first duly sworn, deposes and says that he is Assistant Secretary for the defendant, the Oregon-Washington Railroad & Navigation Company, that he has read the foregoing answer, knows the contents thereof and that the same is true of his own knowledge, except as to the matters which are therein stated to be on his information or belief, and as to those matters that he believes it to be true.

JAMES G. WILSON.

Subscribed and sworn to before me, this 6th of May, 1912.

[Seal]

P. C. WOOD,

Notary Public for Oregon.

[Endorsed]: Filed, May 8, 1912. A. L. Richardson, Clerk. By M. W. Griffith, Deputy Clerk. [9]

*United States District Court, Northern Division,
District of Idaho.*

No. 438.

THE UNITED STATES,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for
the plaintiff.

M. J. McHUGH,

Foreman.

[Endorsed]: Filed May 29, 1912. A. L. Richard-
son, Clerk. [10]

*In the District Court of the United States Within
and for the District of Idaho, Northern Divi-
sion.*

No. 438.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Judgment.

In this cause it appearing to the Court that on the

29th day of May, 1912, a jury duly empaneled, found for the plaintiff, in the above-entitled court, in said cause:

Now, therefore, it is ordered, adjudged and decreed that the plaintiff, the United States of America, do have and recover of and from the defendant, the Oregon-Washington Railroad & Navigation Company, a corporation, the sum of One Hundred Dollars, being the amount assessed by the court as a penalty, as provided by law; and further, the sum of \$76.40, as costs.

Dated June 6th, 1912.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: Filed June 6, 1912. A. L. Richardson, Clerk. [11]

*In the District Court of the United States in and for
the District of Idaho, Northern Division.*

No. 438.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAV-
IGATION COMPANY, a Corporation,
Defendant.

**Stipulation Extending Time for Serving Proposed
Bill of Exceptions.**

IT IS HEREBY STIPULATED, and agreed,
by and between the above-named plaintiff and the
above-named defendant, through their respective

attorneys, that the time within which the above-named defendant may prepare, serve and file its proposed Bill of Exceptions in the above-entitled cause, be extended to July 15th, 1912.

C. H. LINGENFELTER,
United States Attorney,
Attorney for Plaintiff.
By H. C. MILLS, Asst.
W. W. COTTON,
HAMBLIN & GILBERT,
Attorneys for Defendant.

[Endorsed]: Filed July 12, 1912. A. L. Richardson, Clerk. [12]

*In the District Court of the United States for
the District of Idaho, Northern Division.*

No. 438.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

OREGON-WASHINGTON RAILROAD & NAV-
IGATION COMPANY, a Corporation,
Defendant.

Stipulation [Concerning Bill of Exceptions].

IT IS HEREBY STIPULATED AND AGREED, by and between plaintiff and defendant in the above-entitled cause, by their respective attorneys, that the Bill of Exceptions hereto attached embodies all of the exceptions proposed by either party hereto in said cause, and that there are no amend-

ments or proposed amendments thereto; that the said Bill of Exceptions may be settled by the Judge of said Court in the manner provided by the rules of said Court, without further objection by either party hereto.

Dated this 28th day of October, A. D. 1912.

C. H. LINGENFELTER,

U. S. District Attorney,

Attorney for Plaintiff.

W. W. COTTON,

HAMBLEN & GILBERT,

Attorneys for Defendant, Oregon-Washington Railroad & Nav. Co. [13]

*In the District Court of the United States for
the District of Idaho, Northern Division.*

AT LAW—No. 438.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAV-
IGATION COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that on the 29th day of May, 1912, at Coeur d'Alene, Idaho, the above-entitled action came regularly on for trial before the Honorable Frank S. Dietrich, plaintiff appearing by C. H. Lingenfelter, United States Attorney, the defendant appearing by W. A. Robbins and W. S. Gilbert; a jury was duly empaneled and sworn to try

the cause; whereupon, counsel for the respective parties stipulated that this case and case No. 437 should be consolidated for the purpose of trial, separate verdicts to be rendered in each case; whereupon the following proceedings were had:

Plaintiff produced witnesses whose testimony showed that on February 5th, 1912, one Albert May shipped a car of hogs from Stevensville, Montana, to Wallace, Idaho, over the Northern Pacific consigned to Fred Stevens; that the car was loaded at Stevensville at about 12:30 on February 5th; that the car was not provided with feed or water, nor any provision made therefor; that the billing of the car of stock was changed by the Northern Pacific agent at Wallace, from Wallace to Osborne, Idaho.

[Testimony of Albert May, for Plaintiff.]

ALBERT MAY, a witness for plaintiff, testified as follows: [14]

“I am not certain, I wouldn’t be positive, whether the hogs were consigned to Wallace or Osborne, Idaho. It seemed to me it was ordered to Osborne.”

[Testimony of David Franklin Norris, for Plaintiff.]

DAVID FRANKLIN NORRIS, a witness for plaintiff, testified as follows:

“The car arrived from Stevensville, Montana, to Wallace, Idaho, before 3:30 P. M. on February 6, 1912. It was not unloaded at Wallace, but was unloaded at Osborne, Idaho, on the 7th of February. I don’t know positively what hour it was unloaded at Osborne. I didn’t see it unloaded. The first that I had called my attention to this car. This car which

(Testimony of David Franklin Norris.)

came from Stevensville, Montana, which arrived at Wallace on the night of the 6th, was not unloaded for feed, rest and water at any time at Wallace. I know this car wasn't unloaded as the stockyards have a chute that is raised up in order for hogs or any stock to walk on a level out of the car onto a platform and then down an incline to the ground, and in the early part of last winter we had an awful big snow and this snow drifted very deep in the chute, and practically stayed there, a part of this snow, all winter, and that snow wasn't broke all winter from hogs being unloaded, neither in the Northern Pacific nor the O. W. R. & N. stockyards in Wallace. I seen N. P. Car No. 90,515 on the transfer track at 5:15 P. M. on the 6th. I saw the O. W. R. & N. train on the O. W. R. & N. sidetrack; at 11:45 the same evening the car was at the place it was at 7 P. M. Between six and seven o'clock the morning of the 7th of February I seen the car in the train with the train under motion towards Osborne, Idaho, leaving Wallace towards Osborne."

The following testimony of J. C. Allen, commencing on page 39 of the transcript, should be incorporated. [15]

[Testimony of J. C. Allen, for Plaintiff.]

J. C. ALLEN, a witness for plaintiff, testified as follows:

"I was at Osborne, Idaho, on February 5, 1912, employed by F. A. Stevens. I had charge of the office work at that point and receiving the shipments of stock. I remember of the carload of hogs arriv-

(Testimony of J. C. Allen.)

ing at Osborne, Idaho, on February 7, 1912, shipped by May at Stevensville, Mont., and consigned to F. A. Stevens. The car was unloaded about seven A. M. on the morning of the 7th. The number of the car is N. P. 90,515, and it arrived over the O. W. R. & N. side track, and again at 11:45 the same evening the car was in the same place.”

Witnesses further stated that the car was transported by the defendant the morning of the 7th from Wallace to Osborne, and was unloaded about seven o'clock on that date.

[Testimony of H. A. Bard, for Defendant.]

One H. A. BARD, agent of the defendant at Wallace, testified:

“I was agent for the defendant at Wallace on February 7th of this year. I have records or knowledge to the effect that the car in controversy here, arrived in Wallace on February 6th. I have the way-bill here. As to whether or not this way-bill shows when the car arrived, will say that this way-bill does not show it. It shows the delivery to our line is all. The Northern Pacific train register would show their time into Wallace, and of course the delivery here is simply between the connections.

I do not know about this car of hogs having any feed, rest or water. As to whether or not it is my duty as agent to know whether or not a car of stock has been unloaded for rest, feed and water [16] before accepting a car from a connecting carrier, I can't say that it is. I made inquiry as to this stock

(Testimony of H. A. Bard.)

when the car was first turned over to us on the transfer. At that time, my recollection is, that this car had not been unloaded for feed, rest and water; a few minutes before one o'clock in the afternoon. At one o'clock P. M. I knew the car had not been unloaded. I did not observe any one unloading the car of hogs after one o'clock P. M. on February 6th. I turned the car back on the Northern Pacific, refused to accept the car. The car was later sent to Osborne over the O. W. R. & N. Co.'s line."

On cross-examination he further testified: "I refused to accept this shipment from the Northern Pacific. I had a conversation with Mr. C. M. Grubb, the General Agent at that point. At the time the car was delivered to us in transfer and the way-bill delivered, I noticed that the stock had been confined a period of something to exceed twenty-four hours and some minutes. I knew it was impossible for us to get that car to Osborne before the following morning, which would exceed the 36-hour period, and I told Mr. Grubb he would have to take the car back in his yards and unload it for feed, rest and water. Mr. Grubb said, 'All right.' It was very close to one o'clock, immediately after it came to my attention, on February 6th. Our company later accepted delivery of the car, between 6:25 and 6:30 that evening. The car was then lined up in train No. 93, going west. At that time I did not personally know what had become of the car or what had been done with the hogs.

Q. Is there any notation on that way-bill showing

(Testimony of H. A. Bard.)

whether or not this particular car in question was unloaded for feed, rest and water?

A. There is a notation here, but it is wrong. There is a notation here that reads that it was unloaded at Wallace, [17] N. P. at 10 A. M., and we unloaded at 6 P. M.

Q. What is your best recollection—had this car been unloaded for feed, rest and water?

A. It hadn't when I first heard of it, no.

Q. On the morning of the 6th?

A. No, not in the morning—it was a few minutes of one in the afternoon.

Q. On the evening of February 6th, at six—what time do you say the train goes out?

A. The following morning.

Q. The following morning, on the 7th, it went out?

A. Yes, sir.

Q. At that time this car hadn't been unloaded for feed, rest and water?

A. Not to my knowledge; no, sir."

Also the following on page 48 of the transcript should be incorporated:

"Q. In regard to that pencil notation that counsel for the Government inquired about, do you know who put that on?

A. I think it was my operator, I am not sure.

Q. Do you know how it came to be put there?

A. I am sure I don't—it is clearly an error.

Q. How do you judge it is an error?

A. Well, I don't know, I can't say why I do, but I don't think it is correct; in fact, I know it isn't

(Testimony of H. A. Bard.)

correct, because I know the Northern Pacific train wouldn't arrive that early in the morning, in the first place, the train that brought the car of stock to Wallace—

Q. What I am getting at is, you had nothing to do with making that notation yourself? [18]

A. No, sir."

Thereupon counsel for the plaintiff, with the consent of the Court, read from the way-bill accompanying the shipment of hogs in question:

[Description of Way-Bill.]

"Way-bill from Stevensville, Montana, dated February 5th, 1912, to Osborne, Idaho. Consignors May & Truner, Consignee, F. A. Stevens. No one in charge. Loaded 12 P. M. 2-5-12. Released to 36 hours."

Thereupon counsel for defendant read another portion of said way-bill into the record, as follows: "We want the record to show that this way-bill shows that the stock was originally billed from Stevensville, Montana, to Wallace, Idaho, and that a pen line has been drawn through the words 'Wallace, Idaho,' and under it 'Osborne, Idaho,' has been written and across the face of the way-bill is written the following: 'Heading changed by N. P. Agent, Wallace, signed underneath *that* Mr. Grubb's name, C. H. Grubb.' "

Thereupon the plaintiff rested its case and the defendant made the following motion:

[Motion for a Nonsuit, etc.]

At this time, your Honor, we desire to introduce a motion for nonsuit on the ground and for the reason that the Government has failed to make a sufficient case for the jury, as follows:

1. There is no proof that the defendant knew or had any reason to believe that the Northern Pacific did not unload the stock at Wallace, after defendant had refused to accept delivery from the Northern Pacific. The defendant had a right to presume that the Northern Pacific had complied with the law in this respect, and for this reason plaintiff has failed to prove that defendant knowingly or wilfully confined the stock in violation of the statutes.

2. The failure of the Northern Pacific to comply with [19] the law in not unloading the stock at Wallace was an unavoidable cause which could not be anticipated or avoided by the defendant with the exercise of due diligence and foresight, and which prevented the defendant from unloading the stock into properly equipped pens within the statutory time.

3. The evidence shows that after the defendant refused to accept the delivery of the car from the Northern Pacific at Wallace, the Northern Pacific allowed the car to stand on its tracks without unloading for more than the statutory limit. The defendant did not contribute in any to this confinement until after the statutory offense had been committed by the Northern Pacific, and there was no second violation of the law by defendant, since defendant could not commit a second offense until it had con-

fined the stock twenty-eight or thirty-six hours after it had accepted delivery of the car from the Northern Pacific.

Thereupon the Court denied the motion, to which ruling the defendant excepted and exception was allowed.

Thereupon defendant announced that it would stand upon its motion for nonsuit, and would offer no further evidence.

Recital as to Instructions of the Court, Requested Instructions and Exceptions.

Thereupon the Court instructed the jury, among other things, as follows:

[Instructions.]

Now, there is still left for your consideration, No. 438, that I am not able to instruct you to find a verdict in for either one party or the other. It seems that the shipment in question here was made from Stevensville, Montana, to Wallace, Idaho, or by change in the way-bill, to Osborne, Idaho. The initial carrier was the Northern Pacific Railroad Company. In other words, the [20] shipment of the car by that company was made with Northern Pacific Railway Company and delivery of the car was made by that company to the defendant at Wallace. Now, you have heard the testimony as to what occurred at Wallace. There seems to be no conflict in the testimony to the effect that the stock in this car were confined in excess of the statutory period. In other words, as I understand, there is no evidence contradicting the witnesses for the Government that the stock was actually confined for a period in excess

of twenty-eight hours, and indeed, in excess of thirty-six hours, and, of course, if you credit that testimony it would be your duty to find that they had been so confined and that one or the other of these two carriers, the Northern Pacific Railroad Company or this Company violated this law—I say one or the other or both of them. The Northern Pacific Railroad Company is not made a defendant here, so that you must determine whether or not this defendant company, the Oregon-Washington Railroad & Navigation Co., violated the law. You heard the testimony of the agent of the defendant company at Wallace, that this car was offered to his company at Wallace on the afternoon of February 6th, and that upon inquiry, or upon examining the shipping bill, he learned that the stock had been in transit for a certain number of hours, and he concluded that his company could not receive the car and deliver it at Osborne within the statutory period, and therefore he declined to accept it, and advised the Agent of the Northern Pacific Company to that effect. And his testimony further is, as I now remember it, that the Agent of the Northern Pacific Railroad Company replied, “All right,” or words to that effect, and later on in the afternoon, according to the testimony of this witness, his company, the defendant here, received the car and put it in the train which was being made up for Osborne, the train which was to leave the [21] next morning, and the car was taken to Osborne and delivered to the consignee the next morning. Now, practically the only serious question, the question about which the testimony is not clear, if you credit

it, is as to whether or not the defendant here, the Oregon-Washington Railroad & Navigation Company, used reasonable care in finding out whether or not the stock was in fact unloaded and rested and fed and watered at Wallace, after the agent of the defendant told the agent of the Northern Pacific Railroad Company that it would not receive the car in its then condition. I advise you in that respect that it was the duty of the defendant company, through its agent, to make reasonable inquiry and to use reasonable care to find out whether or not the stock had been unloaded and otherwise cared for as provided by the statutes, before it would be warranted in confining the stock longer in the car after it accepted the car. If you find that it did use such reasonable care and was misled, was deceived, and because of being so misled, after using reasonable care, and because of such deception, it inadvertently and unknowingly confined the stock or kept the stock confined longer than the statutory period, then your verdict should be in its favor. If, however, you find that it was not so deceived or misled, then, if you find that the stock was confined in excess of the statutory period, you should find against the defendant.

[Instructions Requested by Defendant.]

The defendant requested the Court to give the following instructions:

I.

You are requested to return a verdict in favor of the defendant, Oregon-Washington Railroad & Navigation Company.

If the foregoing instruction Number One be re-

fused, then the defendant, without waiving its right thereto, requests [22] the Court to give the jury the following instructions:

II.

You are instructed that if the Northern Pacific Railway Company tendered this shipment to the defendant at Wallace, Idaho, on February 6th, 1912, at about the hour of 1:00 P. M. thereof, that at said time and place the defendant refused to accept delivery of said car from the Northern Pacific Railway Company, for the reason that its train connections were such that it could not deliver the car at Osborne within the statutory limit and that after the defendant refused to accept delivery of said car, the Northern Pacific Railway Company permitted the stock to remain in the car over the statutory limit without unloading for feed, water and rest, then I instruct you that the defendant has not violated the law and in that event your verdict must be for the defendant.

III.

If you find that the defendant, when it accepted the car of stock from the Northern Pacific Railway Company, on the morning of February 7th, and at that time had no notice or knowledge that the Northern Pacific Railway Company had failed to unload and feed the stock after it had *first refused* by the defendant on February 6th, then I instruct you that the defendant had a right to presume that the Northern Pacific Railway Company had complied with the law, and in that event you are instructed that the defendant did not knowingly and wilfully confine the stock in violation of the statute, and under these cir-

cumstances your verdict must be for the defendant.

IV.

You are instructed that the failure of the Northern Pacific Railway Company to unload this stock after delivery was [23] refused by the defendant on February 6th, if you so find, was an unavoidable cause which could not be anticipated or avoided by the defendant, in the exercise of due diligence and foresight, and in that event your verdict must be for the defendant.

V.

If you find from the evidence that the defendant refused to accept delivery of the car from the Northern Pacific Railway Company on February 6th, 1912, and after said refusal the Northern Pacific Railway Company allowed the car to stand on its tracks without unloading, as required by the statutes, then I instruct you that the first violation of the law on the part of the Northern Pacific Railway Company was completed and there could be no second violation of the law by the defendant, it had, in fact, confined the stock a second 28 to 36 hours from and after the time it accepted delivery of the car from the Northern Pacific Railway Company. In other words, if you find that the Northern Pacific Railway Company confined this stock over the statutory period on their line and then delivered the car to the defendant, that the defendant would not be guilty of a violation of the law until it had confined the stock another 28 or 36 hours in addition to the time the stock was confined by the Northern Pacific Railway Company.

The Court refused to allow said requested instructions.

[Exceptions to Instructions Given and Refused.]

Thereupon, the defendant excepted to the refusal of the court to give defendant's requested instructions Nos. 1, 2, 3, 4 and 5.

The defendant also took the following exception to the instructions of the Court: [24]

The defendant also excepts to the instructions of the Court to the jury on its own motion, to the effect that it was the duty of the defendant to use reasonable care after having first refused to accept the shipment of stock, to ascertain if the stock had been unloaded for rest, water and feed; and also that part of the instructions given by the Court on its own motion that it was necessary for the defendant to be deceived by the action of the connecting carrier before it would be entitled to rely upon the failure of the Northern Pacific to unload.

The Court said: "Well, as to that last, I intended to instruct the jury only to this effect, that if the defendant used reasonable care, and after using such reasonable care was deceived or misled, then it would be relieved. I didn't mean to say to them that it would be necessary for them to be deceived, that is, apart from the reasonable care.

Mr. GILBERT.—Well, I think perhaps that was correct.

The COURT.—If that is not understood, I will recall the jury and make it plain. I think they were coupled.

Mr. GILBERT.—Yes, I think they were coupled."

[Order Settling and Allowing Bill of Exceptions.]

Settled and allowed as defendant's Bill of Exceptions, pursuant to Stipulation attached.

Done this October 28th, 1912.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed Oct. 29, 1912. A. L. Richardson, Clerk. [25]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

AT LAW—No. 438.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error,

Petition for Writ of Error.

And comes now the plaintiff in error, Oregon-Washington Railroad & Navigation Company, a corporation (defendant in the action), and says that on or about the 1st day of June, A. D. 1912, the above-entitled District Court entered a judgment herein in favor of the plaintiff, United States of America, and against the defendant, Oregon-Washington Railroad & Navigation Company, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in

detail appear from the Assignment of Error which is attached to and filed with this petition.

WHEREFORE, this defendant prays that a Writ of Error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

A. C. SPENCER,

HAMBLEN & GILBERT,

Attorneys for Plaintiff in Error, Oregon-Washington Railroad & Nav. Co. [26]

[Order Allowing Writ of Error.]

On consideration of the foregoing petition and assignments of errors attached thereto, the Court does allow the Writ of Error to defendant, Oregon-Washington Railroad & Navigation Company, upon giving bond according to law in the sum of Five Hundred Dollars, which shall operate as a super-sedeas bond.

Dated this 27th day of November, 1912.

FRANK S. DIETRICH,

United States District Judge for the District of Idaho, who tried said cause and entered said judgment.

[Endorsed]: Filed Nov. 27, 1912. A. L. Richardson, Clerk. [27]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

AT LAW—No. 438.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Plaintiff in Error,
vs.

UNITED STATES OF AMERICA,
Defendant in Error,

Assignment of Errors.

Plaintiff in error, the Oregon-Washington Railroad & Navigation Company, hereby assigns the following errors committed at the trial court:

1. The District Court erred in overruling defendant's motion for nonsuit made at the close of plaintiff's case.

2. The District Court erred in giving the following instruction: "Now, practically the only serious question, the question about which the testimony is not clear, if you credit it, is as to whether or not the defendant here, the Oregon-Washington Railroad & Navigation Company, used reasonable care in finding out whether or not the stock was in fact unloaded and rested and fed and watered at Wallace, after the agent of the defendant told the agent of the Northern Pacific Railroad Company that it would not receive the car in its then condition. I advise you in that respect that it was the duty of the defendant company, through its agent, to make reasonable inquiry and to use reasonable care to find out whether or not

the stock had been unloaded and otherwise cared for as provided by the statute, before it would be warranted in confining the stock longer in the car after it accepted the car. If you find that it did [28] use such reasonable care and was misled, was deceived, and because of being so misled, after using reasonable care, and because of such deception, it inadvertently and unknowingly confined the stock or kept the stock confined longer than the statutory period, then your verdict should be in its favor. If, however, you find that it was not so deceived or misled, then, if you find that the stock was confined in excess of the statutory period, you should find against the defendant."

The foregoing instruction was excepted to and is erroneous, because it incorrectly stated the law as to the duty of the defendant as to making inquiry, etc.

3. The District Court erred in refusing to give instruction No. 2, requested by the defendant, as follows:

"You are instructed that if the Northern Pacific Railway Company tendered this shipment to the defendant at Wallace, Idaho, on February 6th, 1912, at about the hour of 1:00 P. M., thereof, that at said time and place the defendant refused to accept delivery of said car from the Northern Pacific Railway Company for the reason that its train connections were such that it could not deliver the car at Osborne within the statutory limit, and that after the defendant refused to accept delivery of said car, the Northern Pacific Railway Company permitted the stock to remain in the car over the statutory limit without

unloading for feed, water and rest, then I instruct you that the defendant has not violated the law and in that event your verdict must be for the defendant."

4. The District Court erred in refusing to give instruction No. 3 requested by defendant, as follows:

"If you find that the defendant, when it accepted the car of stock from the Northern Pacific Railway Company, on the morning of February 7th, and at that time had no notice or knowledge that the Northern Pacific Railway Company had failed to unload and feed the stock after it had first refused by the defendant on February 6th, [29] then I instruct you that the defendant had a right to presume that the Northern Pacific Railway Company had complied with the law, and in that event you are instructed that the defendant did not knowingly and wilfully confine the stock in violation of the statute, and under these circumstances your verdict must be for the defendant."

5. The District Court erred in refusing to give instruction No. 4 requested by the defendant, as follows:

"You are instructed that the failure of the Northern Pacific Railway Company to unload this stock after delivery was refused by the defendant on February 6th, if you so find, was an unavoidable cause which could not be anticipated or avoided by the defendant, in the exercise of due diligence and foresight, and in that event your verdict must be for the defendant."

6. The District Court erred in refusing to give

instruction No. 5, requested by the defendant, as follows:

“If you find from the evidence that the defendant refused to accept delivery of the car from the Northern Pacific Railway Company on February 6th, 1912, and after said refusal the Northern Pacific Railway Company allowed the car to stand on its tracks without unloading, as required by the statutes, then I instruct you that the first violation of the law on the part of the Northern Pacific Railway Company was completed and there could be no second violation of the law by the defendant, it had, in fact, confined the stock a second 28 to 36 hours from and after the time it accepted delivery of the car from the Northern Pacific Railway Company. In other words, if you find that the Northern Pacific Railway Company confined this stock over the statutory period on their line and then delivered the car to the defendant, that the defendant would not be guilty of a violation of the law until it had confined the stock another 28 or 36 hours in addition to the time the stock was confined by the Northern [30] Pacific Railway Company.”

WHEREFORE, plaintiff in error prays that said judgment of the District Court be reversed and the said District Court ordered to enter judgment dismissing the action.

A. C. SPENCER,

HAMBLÉN & GILBERT,

Attorneys for Plaintiff in Error, Oregon-Washington Railroad & Navigation Company.

[Endorsed]: Filed Nov. 27, 1912. A. L. Richardson, Clerk. [31]

*In the United States District Court for the District
of Idaho, Northern Division.*

AT LAW—No. 438.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Supersedeas and Cost Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS,
that we, Oregon-Washington Railroad & Navigation
Company (a corporation), as principal, and Na-
tional Surety Company (a corporation organized un-
der the laws of the State of New York for the pur-
pose of doing business as a surety and which has
complied with the statutes of the United States
authorizing it to become a surety of bonds in the
Courts of the United States), as surety, are held and
firmly bound unto the United States of America in
the just and full sum of Five Hundred Dollars
(\$500.00), to be paid unto the said above-named
United States of America, its attorneys, officers or
assigns, to which payment, well and truly to be made
we bind ourselves, our successors and our assigns
jointly and severally firmly by these presents.

Sealed with our seals and dated this 2d day of November, A. D. 1912.

Upon the conditions that:

WHEREAS, lately at a session of the United States District Court for the District of Idaho, Northern Division, in a suit pending in said court between the United States of America and the Oregon-Washington [32] Railroad & Navigation Company, a corporation, a judgment was rendered against said defendant upon the verdict of the jury in the sum of One Hundred Dollars (\$100.00) and costs amounting to Seventy-six Dollars and Forty Cents (\$76.40); and,

WHEREAS, said defendant conceiving itself aggrieved thereby, has obtained from said Court a Writ of Error to reverse and correct said judgment in that behalf and a citation directed to the above-named defendant in error admonishing said defendant in error to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California within the time therein fixed; and,

WHEREAS, an order has been entered requiring said defendant to file Supersedeas Bond and Cost Bond in the aggregate sum of Five Hundred Dollars (\$500.00);

NOW, the condition of the above obligation is such that if the said Oregon-Washington Railroad & Navigation Company, a corporation, shall prosecute its said Writ of Error to effect, and answer all damages and costs if it fails to make its plea good in said court, then the above obligation to be void; otherwise

to remain in full force and virtue.

This bond is intended as a bond for costs on appeal and as a Supersedeas Bond.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY.

By A. C. SPENCER and
HAMBLÉN & GILBERT,
Its Agents and Attorneys.

NATIONAL SURETY COMPANY,

By JAMES A. BROWN,
Resident Vice-President.

[Seal] Attest: S. A. MITCHELL,
Resident Asst. Secretary. [33]

The foregoing Bond is hereby approved this 27th day of November, 1912, and the same when filed shall operate as a bond for costs on appeal and as a Supersedeas Bond.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed Nov. 27, 1912. A. L. Richardson, Clerk. [34]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

AT LAW—No. 438.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Writ of Error.

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable
the Judge of the District Court of the United
States, for the District of Idaho, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment, of a plea which is in
the said District Court before you, between the
United States of America, plaintiff, and the Oregon-
Washington Railroad & Navigation Company, a cor-
poration, defendant, a manifest error hath happened,
to the great damage of the said defendant, the Ore-
gon-Washington Railroad & Navigation Company,
a corporation, as by its complaint appears, we being
willing that error, if any hath been, should be duly
corrected, and full and speedy justice done to the
parties aforesaid in this behalf do command you, if
judgment be therein given that then under your seal,
distinctly and openly, you send the record and pro-
ceedings aforesaid, with all things concerning the
same, to the United States Circuit Court of Appeals,
for the Ninth Circuit, together with this Writ, so
that you have the same at San Francisco on the 27th
day of December, 1912, in the said Circuit Court of
Appeals for the Ninth Circuit, to be then and there
held, that the record and proceedings being inspected,
[35] the said Circuit Court of Appeals may cause
further to be done therein to correct that error what
of right, and according to the laws and customs of
the United States, should be done.

WITNESS, The Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 27th day of November, in the year of our Lord one thousand nine hundred and twelve.

[Seal] A. L. RICHARDSON,
Clerk U. S. District Court, for the District of Idaho.
Allowed by:

FRANK S. DIETRICH,
Judge. [36]

[Endorsed]: No. 438. U. S. District Court, Northern Division, District of Idaho. Oregon-Washington Railroad & Navigation Co., Plaintiff in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed Nov. 27th, 1912. A. L. Richardson, Clerk. [37]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

AT LAW—No. 438.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Citation on Writ of Error.

United States of America,

District of Idaho,—ss.

To the United States of America, and to Its Attorney, C. H. LINGENFELTER, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, District of Idaho, wherein the Oregon-Washington Railroad & Navigation Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Coeur d'Alene, in said District, this 27th day of November, 1912.

FRANK S. DIETRICH,

Judge.

[Seal]

Attest:

A. L. RICHARDSON,

Clerk. [38]

Service of the within and foregoing Citation hereby acknowledged by copy this 27th day of November, 1912.

C. H. LINGENFELTER,

United States Attorney for the District of Idaho.

[Endorsed]: No. 438. United States District Court, District of Idaho, Northern Division. Ore-

gon-Washington Railroad & Navigation Company,
Plaintiff in Error, vs. United States of America, De-
fendant in Error. Citation. Filed November 27,
1912. A. L. Richardson, Clerk. [39]

Return to Writ of Error.

And therefore it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal] Attest: A. L. RICHARDSON,
Clerk. [40]

**[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]**

*In the District Court of the United States for the
District of Idaho, Northern Division.*

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Plaintiff in Error,
vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages, numbered from 1 to 41, inclusive, to be full, true and correct copies of the pleadings and proceedings in

the above-entitled cause, and that the same together constitute the transcript of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$26.60, and that the same has been paid by the plaintiff in error.

Witness my hand, and the seal of said Court, this 9th day of December, 1912.

[Seal]

A. L. RICHARDSON,
Clerk. [41]

[Endorsed]: No. 2238. United States Circuit Court of Appeals for the Ninth Circuit. Oregon-Washington Railroad & Navigation Company, a Corporation, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Idaho, Northern Division.

Filed January 3, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

**[Order Enlarging Time Ten Days to File Record in
Circuit Court of Appeals.]**

*In the United States District Court, for the District
of Idaho, Northern Division.*

No. 438.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Plaintiff in Error,
vs.

UNITED STATES OF AMERICA,
Defendant in Error.

This matter coming on for hearing upon the application of the plaintiff in error for an extension of time within which to file its transcript in the United States Circuit Court of Appeals for the Ninth Circuit, and to docket said case, and the Court being satisfied that good cause exists for granting such extension:

IT IS ORDERED, that said time for filing said transcript and docketing said case be, and the same is hereby, extended for a period of ten days.

Done this 27th day of December, 1912.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: No. 2238. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time Ten Days to File Record Thereof and to Docket Case. Filed Jan. 6, 1913. F. D. Monckton, Clerk.

IN THE

United States Circuit Court of Appeals for the Ninth Circuit

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a corporation

Plaintiff in Error

vs.

UNITED STATES OF AMERICA,

Defendant in Error

No. 2238

*Upon Writ of Error to the United States District Court of the District
of Idaho, Northern Division*

OPENING BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

Throughout this brief we will refer to the parties to this case as the Railroad Company for the Plaintiff in Error and the Government for the Defendant in Error.

This is an action brought by the Government against the Railroad Company under the 28 Hour Law (*Act June 29th, 1906, c. 3594, 34 Stat. 607*), involving the shipment of a car of hogs from Stevensville, Montana, over

the Northern Pacific Railway Company to Wallace, Idaho, and from there over the line of the Railroad Company to Osborne, Idaho.

It is undisputed that the car in question was loaded at Stevensville at about 12:30 o'clock on February 5th, 1912, that a 36-hour release was executed, and that the car was not unloaded at Osborne, Idaho, until the morning of February 7th, 1912, and after the 36 hours had expired (*Trans. pg. 13*).

In addition to the foregoing it further appeared at the time the Government rested its case, that the car of hogs in question arrived in Wallace over the Northern Pacific about noon on February 6th (*Trans. pg. 16*). About that time it was placed on the transfer track between the Northern Pacific Railway Company's line and that of the Railroad Company, and a way bill covering the shipment was delivered to Mr. H. A. Bard, Agent for the Railroad Company, at Wallace (*Trans. pg. 16*). The Railroad Company did not have a train out of Wallace for Osborne until the morning of the 7th of February, and Mr. Bard, the Agent, seeing that it would be impossible to deliver the car at Osborne within the 36-hour limit, told the agent for the Northern Pacific that he would have to take the car back into his own yards and unload the hogs for feed, rest and water, and the agent of the Northern Pacific thereupon replied, "All right." (*Trans. pg. 16*.) This was at one o'clock on February

6th. Thereafter and at about 6:30 p. m. of the same day the Northern Pacific again tendered delivery of the car and the Railroad Company accepted it and it was lined up in its own train headed for Osborne, Idaho, on the following morning. Mr. Bard, the Railroad Company's agent, made no further inquiry to ascertain whether or not the Northern Pacific had in fact unloaded the car of hogs for rest, food and water, etc.

At the close of the testimony the Railroad Company made a motion for non-suit on the ground that the Railroad Company, when it finally accepted the car, did not know, or had no reason to believe that the Northern Pacific had not unloaded the stock at Wallace after the Railroad Company first refused to accept delivery, and for the other reasons stated in the motion (*Trans. pg. 19*). This motion the Court denied.

Thereupon the Railroad Company stated that it would stand upon its motion for non-suit and would offer no further evidence, and the Court instructed the jury. A verdict was returned against the Railroad Company, upon which judgment was thereafter entered (*Trans. pg. 9*).

SPECIFICATIONS OF ERROR.

Plaintiff in Error hereby designates the following errors committed by the trial Court, which it will rely upon here:

1. The District Court erred in overruling the Railroad Company's motion for a non-suit made at the close of plaintiff's case.

2. The District Court erred in giving the following instruction, to-wit:

“Now, practically the only serious question, the question about which the testimony is not clear, if you credit it, is as to whether or not the defendant here, the Oregon-Washington Railroad and Navigation Company, used reasonable care in finding out whether or not the stock was in fact unloaded and rested and fed and watered at Wallace, after the Agent of the defendant told the Agent of the Northern Pacific Railroad Company that it would not receive the car in its then condition. I advise you in that respect that it was the duty of the Defendant Company, through its Agent, to make reasonable inquiry and to use reasonable care to find out whether or not the stock had been unloaded and otherwise cared for as provided by the statutes, before it would be warranted in confining the stock longer in the car after it accepted the car. If you find that it did use such reasonable care and was misled, was deceived, and because of being so misled, after using reasonable care, and because of such deception, it inadvertently and unknowingly confined the stock or kept the stock confined longer than the statutory period, then your verdict should be in its favor. If, however, you find that it was not so deceived or misled,

then, if you find that the stock was confined in excess of the statutory period, you should find against the defendant.”

3. The District Court erred in refusing to give Instruction No. 3 requested by the Railroad Company, as follows:

“If you find that the defendant, when it accepted the car of stock from the Northern Pacific Railway Company, on the morning of February 7th, and at that time had no notice or knowledge that the Northern Pacific Railway Company had failed to unload and feed the stock after it had first been refused by the defendant on February 6th, then I instruct you that the defendant had a right to presume that the Northern Pacific Railway Company had complied with the law, and in that event you are instructed that the defendant did not knowingly and wilfully confine the stock in violation of the statute, and under these circumstances your verdict must be for the defendant.”

4. The District Court erred in refusing to give Instruction No. 4 requested by the Railroad Company, as follows:

“You are instructed that the failure of the Northern Pacific Railway Company to unload this stock after delivery was refused by the defendant on February 5th, if you so find, was an unavoidable cause which could not

be anticipated or avoided by the defendant, in the exercise of due diligence and foresight, and in that event your verdict must be for the defendant."

ARGUMENT.

The Court will readily see that it is undisputed that the hogs were confined in the car in excess of the statutory period.

The several specifications of error all relate to one question, and that is as to whether the hogs were confined "knowingly" and "wilfully" within the meaning of the statute, and whether their confinement was due to an unavoidable cause which the Railroad Company could not have anticipated or avoided by the exercise of due diligence and foresight.

In the companion case to this, involving the shipment of hogs by the same railroad from Endicott, Washington to Wallace, Idaho, we have set forth the authorities which in our judgment control the decision in this case, and we will not burden the Court by referring to them at length here. The cases which it seems to us are particularly applicable to the facts in the case at bar, are

United States vs. Sioux City Stock Yards Company, 162 Fed. 565, and

St. Joseph Stock Yards Co., vs. U. S., 187 187 Fed. 104.

For convenience we wish to quote again from the lan-

guage of the Court, Circuit Judge Van Devanter, in *St. Louis & S. F. R. Co. vs. U. S.*, 169 *Fed.* 69, as follows:

“ ‘Knowingly’ evidently means with a knowledge of the facts which taken together constitute the failure to comply with the statute, as in the case where one carrier receives from another a car loaded with cattle, and, *with knowledge of how long they then had been confined in the car without rest, water or food, prolongs the confinement until the statutory limit is exceeded.*” (*Italics ours.*)

The foregoing statement of the proper construction to be given to the 28 Hour Law has been approved so often by various Federal Courts, that we doubt not that it will be accepted by this Court.

In view of this construction how can it be said that the Railroad Company in this case knowingly confined the hogs in question in violation of the statute? Does not the evidence disclose that Mr. Bard, the representative of the Railroad Company, took particular pains and care to avoid a violation of the law?

We ask the Court to bear in mind the situation in this case. Stevensville, Montana, is evidently located at a considerable distance from Wallace, Idaho, because it required the Northern Pacific Railway Company approximately 24 hours to bring the shipment from the former to the latter point. Osborne, Idaho, on the other hand, is

only a few miles from Wallace. The Northern Pacific Railway Company knew, or must have known, that the Railroad Company in this case had no regular train out of Wallace to Osborne until the following morning. In view of these circumstances it was right and proper for Mr. Bard, the Agent of the Railroad Company, in the interest of his company to decline to accept from the Northern Pacific the car of hogs when it was placed upon the transfer track and it showed his desire to avoid a violation of the law by his insisting that the Northern Pacific take the car back and unload, feed, water and rest the hogs.

But in addition to this Mr. Bard had the assurance of the Northern Pacific Agent that the car of hogs would be properly taken care of. A sufficient length of time elapsed for the Northern Pacific to care for the hogs as required by the statute, and as agreed by its agent, before the car was again tendered to the Railroad Company.

Now it seems to us that nothing short of knowledge on the part of the Railroad Company that the Northern Pacific had not unloaded the hogs, etc., would be sufficient to fix liability on the part of the Railroad Company. It is true that the Railroad Company had been advised of the time when the hogs were loaded, but on the other hand it had the assurance of the Northern Pacific that the hogs would be taken care of. Now it will, of course,

be conceded that if there had not been any notation on the way bill as to the time when the hogs were loaded, or if the Railroad Company in this case had not been otherwise advised as to the time when the hogs were loaded, it would not have been guilty of a knowing violation of the Act by confining them over the statutory period. This has been determined in *St. Louis & S. F. R. Co. vs. U. S.*, *supra*, 169 *Fed.* 69, and further it could not be said that it would have been the duty of the Railroad Company under these circumstances to have used reasonable diligence in determining how long the hogs had been confined.

It seems to us that the same reasoning and the same argument applies to the situation in this case. Not only did the Railroad Company not have knowledge of how long the hogs had been confined in the car at the time of the second delivery to it at Wallace, but on the contrary had the right to assume under the circumstances that the Northern Pacific had performed its duty and had done what its agent agreed would be done in the matter of properly taking care of the hogs.

In this connection we think the learned trial Court erred in instructing the jury as indicated in Specification of Error No. 2. In our opinion the instruction is erroneous in two particulars. In the first place, we contend that no duty devolved upon the Railroad Company to use reasonable care to ascertain whether or not the

car of hogs had been unloaded after being first tendered to the Railroad Company by the Northern Pacific. In the second place, even assuming that the Railroad Company was required to use reasonable care the learned trial Court had no right to couple with that duty the further instruction that it was necessary for the Railroad Company to be misled or deceived before it could be excused for accepting the shipment.

The case at bar is analogous in many respects to those decisions of the Federal Courts where a shipment of cattle has been delivered to a terminal stock yards company, which also has switching facilities, at a time when the statutory limit has almost expired, and when there yet remains not sufficient time to complete the carriage within the statutory period. In this case the Northern Pacific knew that it was impossible for the Railroad Company to complete the carriage within the statutory limit by using its regular train, and when the Northern Pacific took the car back with the agreement to unload the shipment, we earnestly contend that the Railroad Company in this case had the right to rely upon the promise that the Northern Pacific would do its duty.

In this connection there is another consideration which we believe should be called to the attention of the Court as affecting the jurisdiction of the Court. It is undisputed that this shipment of hogs was billed from Stevensville, Montana, to Wallace, Idaho, and that it traveled

under such billing over the line of the Northern Pacific Railway Company to Wallace. After this shipment arrived at Wallace for some reason or other it was decided to change its destination and for convenience, and we assume for the purpose of avoiding making out a new way bill, the Northern Pacific agent at Wallace changed the way bill by striking out the word "Wallace" as the place of destination, and writing in "Osborne." (*Trans. pg. 18.*) It then became necessary for the shipment to pass over the line of the Railroad Company from Wallace to Osborne as the Northern Pacific Railway Company has no line into the latter point. It seems to us that the interstate character of the shipment vanished when the car arrived at Wallace, and as far as the Railroad Company in this case is concerned, it became merely an intrastate shipment. This is just as much true as if the Northern Pacific had unloaded the car of hogs at Wallace, driven them over to the stock pens of the Oregon-Washington Railroad & Navigation Company, where they would be loaded into a different car.

In any event it seems clear to us that the hogs in question were not confined by the Railroad Company wilfully and knowingly, and for that reason the judgment of the lower Court should be reversed, with instructions to dismiss the action.

Respectfully submitted,

A. C. SPENCER,

HAMBLETON & GILBERT,

*Attorneys for Plaintiff in
Error.*

IN THE
**United States Circuit Court of Appeals
for the Ninth Circuit**

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corpora-
tion,

Plaintiff in Error No. 2238.

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

*Upon Writ of Error in the United States District Court of
Idaho, Northern Division.*

BRIEF OF DEFENDANT IN ERROR

Defendant in Error, the United States, answering the brief of Plaintiff in Error, finds that the issues are confined to the single proposition as to whether or not the Court was justified in submitting the case to the jury.

There appears to be no disputed questions of fact. The stock in question was shipped from Stevensville, Montana, on February 5, 1912, consigned to F. A. Stevens. The hogs were loaded at 12:30 p. m. on said date and arrived at Wallace, Idaho, at about 12:30 p. m. on the 6th. At 1:00 p. m. on the 6th the agent of the railroad company refused to accept the car of hogs from the Northern Pacific for the reason, as claimed

by him, that the stock could not reach Osboone, Idaho, the place of destination, within the thirty-six hour period; and further that he informed the Northern Pacific agent that the Northern Pacific would have to take the car back into its yards and unload the hogs for food, water and rest. The Plaintiff in Error accepted the car for delivery between 6:25 and 6:30 p. m. on the 6th and made no inquiry as to whether or not the stock had been unloaded for food, water and rest.

The weigh bill delivered by the Northern Pacific to the railroad company disclosed that the car of hogs was "loaded February 5th at Stevensville, Montana, consignors May & Truner, consignee, F. A. Stevens, no one in charge, loaded 12:00 p. m., release 36 hours."

The fallacy of the contention of the railroad company is clearly shown by the fact that there was no obligation on the part of the Agent of the Northern Pacific to unload the stock for food, rest and water, as the stock had been confined about twenty-four and one-half hours at the time the agent of the railroad company refused to accept the car and turned it back to the Northern Pacific for unloading. The Plaintiff in Error, the connecting carrier, received the stock about 6:25 or 6:30 p. m. of the 6th, being the same evening, with knowledge that its next train for Osborne, Idaho, would leave on the following morning and that about 31 hours of the time had expired at the time of receiving the car. It clearly became the duty of the railroad company to make reasonable inquiry before confining the stock beyond the prescribed limit. It would not be germane to the spirit of the act to permit the initial and connecting carriers to undertake to shift responsibility from one to the other by giving directions as to their mutual duties, and thus defeat the salutary provisions of the act. To summarize:

(a) The railroad company had knowledge of the time the hogs were loaded;

(b) That there was no one in charge of the car;

(c) That a 36-hour release had been executed by the consignors;

(d) That the stock had been confined 24 1-2 hours when first tendered to the railroad company by the Northern Pacific agent;

(e) That about 31 hours had expired before the railroad company accepted the stock;

(f) That there was no obligation on the Northern Pacific agent to unload, feed, water and rest the hogs;

(g) That the weigh-bill delivered by the Northern Pacific to the railroad company imparted notice.

(h) That it became the duty of the railroad company to unload said hogs for food, water and rest at Wallace, Idaho;

(i) That the railroad company knowingly and intentionally confined the stock for a period of 43 hours and 45 minutes without unloading for food, water and rest.

The cases cited by counsel are not in point as the railroad company had knowledge of the length of time the hogs had been confined in the car, and any direction by the Northern Pacific, or assurance of the Northern Pacific that the hogs would be taken care of, would constitute no defense, as there was no duty devolving upon the Northern Pacific to do so.

Section 3, of the act known as "The 28-hour law" gives a lien to the railroad company for expense incurred in unloading stock for rest, food and water

"Whether the railroad company knowingly and wilfully failed to comply with the statute is a question of fact for submission to the jury"

U. S. vs. N. Y. Cen. & Hudson River Ry. Co., 156 Fed. 249.

U. S. vs. Lehigh Valley R. R. Co., 184 Fed. 871, affirmed 187 Fed. 1006.

U. S. vs. St. Joseph Stock Yards Co., 181 Fed. 625.

U. S. vs. North Pac. Terminal Co., 181 Fed. 879.

"The statute places the duty of feeding the cattle upon the carrier which transports them to their destination, and not upon independent companies which receive the live stock simply to give them food, water and rest at their stock yards, and then it surrenders them to the carrier for a continuance of the journey. If an independent company has actual knowledge of the confinement in cars beyond the time limited, and fails to use due diligence in unloading the stock, would doubtless be liable for its disregarding the law."

U. S. vs. Stock Yards Terminal Co., 178 Fed. 19.

"A carrier must be deemed to have knowingly and willingly violated the law, unless he was prevented from unloading for rest, food and water, as required by law, by a cause which could not have been avoided by due care."

Newport News & Miss. Val. Co. vs. U. S., 61 Fed. 488.

"The statute places the duty of feeding the cattle upon the carrier which transports them to their destination, and not upon independent companies which receive the live stock simply to give them food, water and rest at their stock yards, and then it surrenders them to the carrier for a continuance of the journey. If an independent company has actual knowl-

edge of the confinement in cars beyond the time limited, and fails to use due diligence in unloading the stock, would doubtless be liable for its disregarding the law."

U. S. vs. Stock Yards Terminal Co., 178 Fed. 19.

"A carrier knowingly and wilfully violates the statute if it loads stock at one of its stations when according to the schedule or ordinary running time of the train it cannot reach a place where they will be unloaded and given food, rest and water within the required time, and they are not in fact given such food, rest and water."

U. S. vs. Sioux City Stock Yards Co., 162 Fed. 566.

See companion brief for further authorities.

No error having been committed by the Court in the submission of the case to the jury, the judgment should be affirmed.

Respectfully submitted,

C. H. LINGENFELTER,

*United States Attorney for the District of Idaho, Attorney
for Defendant in Error.*

United States
Circuit Court of Appeals
For the Ninth Circuit.

W. J. ROWE,

Plaintiff in Error,

vs.

ALASKA BANKING AND SAFE DEPOSIT COM-
PANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Alaska, Second Division.

FILED

FEB 15 1913

INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Attorneys of Record.

ELWOOD BRUNER, Nome, Alaska, Attorney for
Plaintiff.

IRA D. ORTON, Nome, Alaska, Attorney for De-
fendant.

*In the District Court, District of Alaska, Second
Division.*

W. J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT COM-
PANY, a Corporation,

Defendant.

Complaint.

Plaintiff complains of the defendant and alleges:

1.

That the defendant, Alaska Banking & Safe Deposit Company, is a corporation organized and existing under and by virtue of the laws of the State of West Virginia, and doing business in the District of Alaska.

2.

That the Pacific Cold Storage Company, hereinafter mentioned, is a corporation organized and existing under and by virtue of the laws of the State of Washington, and doing business in the District of Alaska.

3.

That E. W. Carlton & Co., hereinafter mentioned,

is a copartnership composed of E. W. Carlton and J. A. Milne, doing business in the District of Alaska.

4.

That between the 28th day of February, 1911, and the 7th day of July, 1911, the said plaintiff, W. J. Rowe, sold merchandise to, and performed work and labor for, the defendant, and at the request of the defendant delivered the said merchandise and performed the said labor to and for the Thorson Mining Company, a copartnership doing business at or near the Town of Nome, in said District of Alaska. [1*]

5.

That said defendant promised to pay the plaintiff the reasonable value of said merchandise and said work and labor; that the reasonable value of said merchandise, and said work and labor was and is the sum of \$3,522.01, and that the defendant has paid on account thereof the sum of \$1,882.00, and no more.

6.

That there is now due and owing from the defendant to the plaintiff the sum of \$1,640.01, no part of which has been paid.

And for a second further and separate cause of action against said defendant, plaintiff alleges:

1.

That between the 11th day of February, 1911, and the 23d day of June, 1911, the aforementioned Pacific Cold Storage Company, a corporation, as aforesaid, sold and delivered to the defendant meat and

*Page-number appearing at foot of page of original certified Record.

butcher supplies of the reasonable value of \$665.11, and at the request of the defendant delivered the same to the aforementioned Thorson Mining Company.

2.

That the defendant promised to pay to the said Pacific Cold Storage Company the sum of \$665.11 therefor, but that it has not paid the said sum nor any part thereof, save and except the sum of \$252.68.

3.

That prior to the commencement of this action, for a valuable consideration, the said Pacific Cold Storage Company, a corporation, as aforesaid, by an instrument in writing, sold and delivered the said account to the plaintiff, who is now the owner and holder of the same.

4.

That there is now due and owing from the defendant to the [2] plaintiff the sum of \$412.43, on said account.

And for a third further and separate cause of action against said defendant, plaintiff alleges:

1.

That between the 13th day of February, 1911, and the 27th day of June, 1911, the said E. W. Carlton & Co., a copartnership, as aforesaid, sold and delivered to the defendant hardware and other mining supplies of the reasonable value of \$674.20, and at the request of the defendant delivered the same to the aforesaid Thorson Mining Company.

2.

That the defendant promised to pay the said E. W. Carlton, the sum of \$674.20 therefor.

3.

That before the commencement of this action the said E. W. Carlton & Co. sold, assigned and delivered, by an instrument in writing, said account to the plaintiff, and the plaintiff is now the owner and holder of the same.

4.

That defendant has not paid the said account nor any part thereof save and except the sum of \$301.00, and there is now due and owing from the said defendant to the plaintiff the sum of \$373.20, on said account.

WHEREFORE, plaintiff prays judgment against the said defendant for the sum of \$2,425.64, and for his costs of suit.

ELWOOD BRUNER,
J. ALLISON BRUNER,
Attorneys for Plaintiff. [3]

United States of America,
District of Alaska,—ss.

W. J. Rowe, being first duly sworn, on his oath, deposes and says:

That he is the plaintiff in the above-entitled action; that he has read the within and foregoing complaint, knows the contents thereof, and believes the same to be true.

W. J. ROWE.

Subscribed and sworn to before me this 22d day of July, 1911.

[Notarial Seal] J. ALLISON BRUNER,
Notary Public, District of Alaska.

[Endorsed]: #2303. No.—. In the District Court, District of Alaska, Second Division. W. J. Rowe, Plaintiff, vs. Alaska Banking & Safe Deposit Company, a Corporation, Defendant. Complaint. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 25, 1911. John Sundback, Clerk. By ———, Deputy. L. Elwood Bruner, J. Allison Bruner, Attorneys for Plaintiff. [4]

*In the District Court for the District of Alaska,
Second Division.*

No. 2303.

W. J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT COM-
PANY, a Corporation,

Defendant.

Answer.

Comes now the defendant, by its attorneys, and answering the plaintiff's complaint herein, denies each and every allegation, matter, and thing in the said complaint contained, and the whole thereof; except, only, it admits the allegations of paragraph numbered 1, and denies any knowledge or informa-

tion sufficient to form a belief of the allegations of paragraph numbered 3, on page numbered (1) of said complaint.

And for a further and separate answer and defense the defendant alleges that it is a corporation duly organized and incorporated under and by virtue of the laws of the State of West Virginia for the purpose of buying and selling bullion and mining claims, receiving deposits of gold, valuables, and securities for safekeeping, buying and selling exchange, and transacting such business as is usually conducted by banking and safe deposit institutions, and also for the purpose of transacting the business of a title and trust company as provided by the laws of the State of West Virginia in reference thereto, and for no other purpose; that during all the times mentioned in plaintiff's complaint the defendant was, and now is, conducting a banking and safe deposit business and buying and selling bullion and exchange, at Nome, Alaska, and doing no other business; and that the defendant was, and is, without any power or authority to hire labor or purchase merchandise for the purposes mentioned in plaintiff's complaint, or to make any of the agreements [5] or promises set forth in said complaint.

Wherefore, the defendant demands judgment that the plaintiff take nothing by his said action, and that the defendant recover from the plaintiff its costs and disbursements herein.

F. E. FULLER,
IRA D. ORTON,
Attorneys for Defendant.

District of Alaska,—ss.

F. H. Thatcher, being first duly sworn, deposes and says: That he is the president and manager of the above-named defendant corporation and makes this affidavit and verification in its behalf; that he has read the foregoing answer and knows the contents thereof, and that he believes the same to be true.

F. H. THATCHER.

Subscribed and sworn to before me this 24th day of August, 1911.

[Notarial Seal]

F. E. FULLER,
Notary Public.

Due service of within answer is hereby admitted this 24th day of August, 1911.

J. ALLISON BRUNER,
Of Attys. for Plaintiff.

[Endorsed]: No. 2303. In the District Court for the District of Alaska, Second Division. W. J. Rowe, Plaintiff, vs. Alaska Banking & Safe Deposit Co., Defendant. Answer. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 24, 1911. John Sundback, Clerk. By —————, Deputy. L. F. E. Fuller, Ira D. Orton, Attorneys for Defendant. [6]

*In the District Court, District of Alaska, Second
Division.*

W. J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT CO., a
Corporation,

Defendant.

Reply.

Comes now the plaintiff and for reply to the further and separate answer and defense of the defendant, denies each and every allegation contained in said further and separate answer and defense.

ELWOOD BRUNER,

J. ALLISON BRUNER,

Attorneys for Plaintiff.

United States of America,

District of Alaska,—ss.

W. J. Rowe, being first duly sworn, on his oath deposes and says:

That he is the plaintiff in the above-entitled action; that he has read the foregoing reply, knows the contents thereof and that the same is true.

W. J. ROWE.

Subscribed and sworn to before me this 29th day of August, 1911.

[Notarial Seal]

J. ALLISON BRUNER,

Notary Public, District of Alaska. [7]

Service of the within Reply is hereby accepted
this 29th day of August, 1911.

F. E. FULLER,
Atty. for Defendant.

[Endorsed]: #2303. In the District Court for
the District of Alaska, Second Division. W. J.
Rowe, Plaintiff, vs. Alaska Banking & Safe Deposit
Co., Defendant. Reply. Filed in the office of the
Clerk of the District Court of Alaska, Second Divi-
sion, at Nome. Aug. 29, 1911. John Sundback,
Clerk. By —————, Deputy. L. Elwood Brun-
ner, J. Allison Bruner, Attorneys for Plff. [8]

**[Minutes, October 3, 1911—Re Motion for Judgment
of Nonsuit, etc.]**

*In the District Court for the District of Alaska,
Second Division.*

Term Minutes, General 1911 Term, Beginning Feb-
ruary 1, 1911.

Tuesday, October 3, 1911, at 10 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge,
Presiding.

Upon the convening of Court the following pro-
ceedings were had:

2303

W. J. ROWE

vs.

ALASKA BANKING & SAFE DEPOSIT CO.

* * * * *

Thereupon Mr. Orton for defendant moved the Court for a judgment of nonsuit against the plaintiff, upon the ground that plaintiff had failed to prove a cause sufficient to be submitted to a jury, motion based on subdivision 3, section 237, of the Code. Motion made as to entire action, and separately as to each cause of action.

That the evidence fails to show that any goods were sold and delivered to the defendant by respective parties named as plaintiffs; that evidence fails to show that Mr. Sheldon had any authority on behalf of Alaska Banking & Safe Deposit Co. to make any agreement or contract for the sale of goods to be delivered to Thorsen & Co.; and on the further ground that the alleged guarantee given by Mr. Sheldon is oral, and the alleged contract alleged to have been given by him was oral and therefore within the Statute of Frauds.

The Court admonished and excused the jury until 2 P. M. to-day.

Thereupon the Court adjourned until 1 P. M. to-day.

1 P. M.

2303

W. J. ROWE

vs.

ALASKA BANKING & SAFE DEPOSIT CO.

Argument on motion for nonsuit was resumed,—Mr. Elwood Bruner for plaintiff, and Mr. Orton concluding for defendant.

The jury were then called into the jury-box and all answered present.

Motion for judgment for nonsuit was granted.

The jury were thereupon discharged from further attendance on this case. [9]

*In the District Court for the District of Alaska,
Second Division.*

No. 2303.

W. J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT COM-
PANY, a Corporation,

Defendant.

Judgment.

This action came on regularly for trial before the above-named court on the 2d day of October, 1911, Elwood Bruner, Esq., appearing for the plaintiff and F. E. Fuller, Esq., and Ira D. Orton, Esq., appearing for the defendant, and a jury was duly empaneled and sworn to try the issues in said action and evidence was given on the part of the plaintiff and the plaintiff's testimony was closed, and thereupon the defendant moved for a judgment of nonsuit upon the ground that the plaintiff had failed to prove a cause sufficient to be submitted to the jury; and such motion was argued by counsel and duly submitted to the Court, and the Court, having duly considered the same and being fully advised in the premises,

allowed said motion and ordered that said action be dismissed; and thereafter the plaintiff filed his motion for a new trial and the same was duly submitted to the Court and by the Court denied, and it was ordered that judgment be entered herein.

Wherefore, by reason of the law and the premises, it is now ordered, adjudged and decreed that the said action be, and it hereby is, dismissed, and it is further ordered, adjudged, and decreed that the defendant, Alaska Banking & Safe Deposit Company, have and recover from the plaintiff, W. J. Rowe, its costs and disbursements herein, taxed at \$55.80, and accruing costs, and that execution issue therefor.

Done in open court this 14 day of October, 1911.

CORNELIUS D. MURANE,

District Judge.

O. K.—E. B. [10]

[Endorsed]: No. 2303. In the District Court for the District of Alaska, Second Division. W. J. Rowe, Plaintiff, vs. Alaska Banking & Safe Deposit Co., Defendant. Judgment. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 14, 1911. John Sundback, Clerk. By J. Allison Bruner, Deputy. F. E. Fuller, Ira D. Orton, Attorneys for Deft. Vol. 9, Orders and Judgments, p. 164. C. [11]

*In the District Court for the District of Alaska,
Second Division.*

No. 2303.

WILLIAM J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT COM-
PANY, a Corporation,

Defendant.

Bill of Exceptions.

The above-entitled action came on regularly for trial on the —— day of ———, 1911, before the Honorable Cornelius D. Murane, Judge of the above-entitled court, whereupon a jury of twelve persons was duly empaneled; plaintiff was represented by Elwood Bruner, his attorney, and the defendant by Messrs. Ira D. Orton and F. E. Fuller, its attorneys, and following are the proceedings had on the trial:
[12]

After the jury was sworn the opening statement for plaintiff was made by Elwood Bruner and for the defendant by Ira D. Orton.

[Testimony of Joe V. Sheldon, for Plaintiff.]

Thereupon Mr. JOE V. SHELDON was called as a witness on behalf of the plaintiff, and after being first duly sworn testified as follows:

Direct Examination.

I am a resident of Nome, Alaska. During the months of January, February, March, April, May

(Testimony of Joe V. Sheldon.)

and June, of the year 1911, I occupied the position of Acting Cashier of the Alaska Banking & Safe Deposit Company, the defendant in this action. I acted in that capacity until the arrival of Mr. Thatcher from the outside; he is the manager and cashier of the bank.

Thereupon the following questions were asked and the following answers given:

Q. (By Plaintiff's Counsel.) Were you also acting as manager of the bank during that period?

A. I don't know whether you would call it manager or not.

Q. Was there any person acting or attending to the business affairs of the bank, or had charge of the affairs of the bank, besides yourself?

A. Mr. Thatcher was manager of the bank.

Q. In Nome, I mean—was there any person in Nome, attending to the business of the bank who had more authority than you had in that regard?

A. Not in Nome.

Q. Not in Nome? A. No, sir. [13]

Q. You were acting manager of the bank as well as acting cashier, were you not?

Mr. FULLER.—Object to any testimony that he was acting manager of the bank, because there is no such officer known to the banking business.

The COURT.—Objection sustained.

To which ruling of the Court an exception was then and there taken and duly allowed by the Court.

Q. Well, during that time you were directing the affairs of the bank in Nome, were you not?

(Testimony of Joe V. Sheldon.)

Mr. FULLER.—Objected to as leading.

The COURT.—Objection overruled.

Mr. BRUNER.—The Court will take judicial notice that this is a hostile witness.

Mr. ORTON.—There has nothing been shown so far, that the witness is in anywise hostile or otherwise.

A. Why, yes; I suppose so.

Q. Do you know Al. Folsom? A. Yes, sir.

Q. Now, during the months I have named, February, March, April, May, and June, had he anything to do with the business of the bank?

A. No, sir, he did not.

Q. Was he in the employ of the bank in any way?

A. What is that?

Q. Was he an employee of the bank in any way?

A. Why, I asked him to expert some ground for me.

Q. Did you ask him to expert the claim that was being worked by the Thorsen Mining Company?

A. Yes, sir. [14]

Q. That was in February, wasn't it of that year?

A. I don't remember exactly when it was now.

Q. It was before—do you remember taking a mortgage on behalf of the bank on the property of the Thorsen Mining Company?

Mr. ORTON.—That is objected to as irrelevant, and immaterial, and would not tend in any way to show that the Alaska Banking & Safe Deposit Company, purchased any goods of any of these parties plaintiff, or any of them.

(Testimony of Joe V. Sheldon.)

Mr. BRUNER.—We may just as well have this question settled now, and I will state to counsel and the Court that I am asking this question for the purpose of showing the course we intend to pursue in this case. We are going to contend that the Alaska Bank through this particular act on the part of Mr. Sheldon, in sending Thorsen Mining Company out these goods with which to mine the ground. We want to show it as a consideration for which he made these promises to pay for these goods which he had made to these parties, to show the absolute interest of the bank for which he was acting cashier and in charge of its affairs.

Mr. ORTON.—That don't in any way tend to show it, that he sent out Mr. Folsom to expert any ground belonging to the Thorsen Mining Company.

The COURT.—The objection is sustained; we cannot anticipate evidence in this way.

Exception taken by plaintiff and allowed.

(Paper handed witness.)

A. Yes, sir. [15]

Mr. BRUNER.—We will offer this for identification at this time; we will ask to have it marked for identification, but we are not offering to introduce it in evidence at this time, said paper being a chattel mortgage from H. Thorsen et al, to the Alaska Banking & Safe Deposit Co.

(Paper referred to marked for Identification
“Plaintiff's Identification ‘A.’ ”)

Q. Do you know Pete Olsen? A. I do.

Q. Do you know Gus Lynell? A. I do.

(Testimony of S. W. Taggart.)

Mr. BRUNER.—That will be all with this witness at this time.

(Witness withdrawn.)

[Testimony of S. W. Taggart, for Plaintiff.]

Mr. S. W. TAGGART, a witness called on behalf of plaintiff, being duly sworn testified as follows:

Direct Examination.

I am in the employ of the Pacific Cold Storage Company in Nome, Alaska. I am acting manager or resident manager, whatever you are a mind to call it. I know the Thorsen Gold Mining Company.

Thereupon the following proceedings were had:

Q. (By Plaintiff's Counsel.) State whether or not you did any business with the Thorsen Gold Mining Company on behalf of the Pacific Cold Storage Company during the last winter months?

A. Yes, sir.

Q. Did Mr. Sheldon, or any other person on behalf of the Alaska Banking & Safe Deposit Company, order any goods to be delivered by you to the Thorsen Mining Company? [16] A. They did.

Mr. ORTON.—Objected to as leading, and also as calling for a conclusion of the witness as to whether any person was acting on behalf of the Alaska Banking & Safe Deposit Company. We make the further objection that the cashier of the Alaska Banking & Safe Deposit Company had no implied authority to order goods to be delivered to the Thorsen Mining Company.

Mr. BRUNER.—I am getting at their relations

(Testimony of S. W. Taggart.)

with these plaintiffs in that regard.

Mr. ORTON.—We object to the question because the cashier of a bank has well defined authorities, and it is not one of the implied authorities of a cashier of a bank to buy or purchase butcher's supplies, or any other goods, wares or merchandise, for any third person upon the credit of the bank; that is not one of the ordinary powers of a cashier, in the ordinary business carried on by a bank.

Mr. BRUNER.—We expect to show that Mr. Sheldon acting on behalf of the Alaska Bank, and representing the Alaska Bank made these purchases.

Mr. FULLER.—We object to the statement of counsel in the presence of the jury.

The COURT.—The witness has answered the question.

Mr. ORTON.—I move to strike out the answer of the witness.

The COURT.—Motion is sustained.

Mr. ORTON.—I will resubmit my objections—shall I restate them, your Honor? [17]

The COURT.—No, it will not be necessary to restate them. The objection will be overruled at this time.

(Question read.)

A. I did—they did.

Q. State as near as you can what date it was in February when you made your arrangements with Mr. Sheldon.

Mr. ORTON.—That is objected to as the witness

(Testimony of S. W. Taggart.)

has not stated that he made any arrangements with Mr. Sheldon.

The COURT.—The question is immaterial so far, because it presumes something the witness has not stated. Objection sustained.

Exception taken by plaintiff and allowed.

Mr. BRUNER.—He testified that he made arrangements on behalf of the Thorsen Mining Company, through the bank.

Mr. ORTON.—We object to this question as presuming that the witness has made any arrangement whatever with Mr. Sheldon. The witness has testified that he had made arrangements in connection with Thorsen Mining Company, with the Alaska Bank, but he did not state that he had any arrangements whatsoever with Mr. Sheldon.

The COURT.—There is nothing before the Court at this time. Proceed with another question.

Q. State the circumstances, then, Mr. Taggart, with whom you consulted on behalf of the Alaska Bank.

Mr. ORTON.—That is objected to as assuming that he made any arrangements with the Alaska Bank.

The COURT.—Objection sustained. [18]

To which ruling of the Court the plaintiff then and there excepted and an exception was allowed.

Q. Did you sell any goods to the Alaska Bank or on the order of the Alaska Bank, Mr. Taggart, and upon the order of the bank deliver the same to Thorsen Mining Company?

Mr. ORTON.—I object to that because I don't

(Testimony of S. W. Taggart.)

understand in a case of this kind that he can testify to the case wholesale in this manner. If counsel are going to put in their case in this leading manner, without any direct testimony concerning the identity of the person or persons to whom he sold the goods, we certainly shall object to the same because it is calling for the conclusion of the witness. We think he should state the facts leading up to this transaction and let the jury determine whether or not any goods were sold to the bank. We object to it as being incompetent, irrelevant and immaterial, and leading.

The COURT.—Objection sustained.

To which ruling of the Court the plaintiff excepted and an exception was duly allowed.

Q. Did you have any connection with the Alaska Banking & Safe Deposit Company in connection with the delivery of any goods to the Thorsen Mining Company? A. I did.

Q. State what they were.

A. I delivered goods to Thorsen Mining Company upon the order of Joe Sheldon, of the Alaska Bank.

Mr. ORTON.—That is objected to as a conclusion of the witness, and move to strike out the statement [19] of the witness. I think there should be some testimony as to what Mr. Sheldon said, and not give his conclusions. That is the very question for the Court and jury to determine from the evidence—upon what the order may have been based—what was said, and not allow the witness to testify to his conclusions, which is a mixed question of law and fact.

(Testimony of S. W. Taggart.)

I move to strike out the answer of the witness as his conclusion, without basing his answer upon what Mr. Sheldon said.

The COURT.—The conclusion will be stricken out. I think Mr. Taggart should simply state what their business relations were, what was said and done and what the transaction was, and show in what relation Mr. Sheldon stood with the bank in this transaction, which will be determined by what was said and done.

Q. Now, Mr. Taggart, will you simply state what your business relations were—what was said and done by you and Mr. Sheldon in relation to the bank in this transaction?

Mr. ORTON.—I desire to make the further objection with reference to Mr. Sheldon that Mr. Sheldon had no authority from the bank—that it does not appear that he had any actual authority or implied authority to purchase goods, wares and merchandise and order them delivered to a third party on the credit of the bank, or on credit.

The COURT.—Objection overruled.

A. I can't tell without some explanation; I don't know how. [20]

Q. Well, tell what conversation you had with Mr. Sheldon in regard to the bills of the Thorsen Mining company.

A. When we shut down credit to Thorsen Mining Company, and refused to let them have any more goods—

Mr. ORTON.—(Interrupting.) I move to strike

(Testimony of S. W. Taggart.)

out the answer of the witness as not responsive, incompetent, irrelevant and immaterial to the allegations in this complaint.

The COURT.—The answer will be stricken out. The only thing you are called upon to testify to now is the transaction you had with Mr. Sheldon, what he said and what you said.

A. There were several conversations had, your Honor.

Q. Tell the conversation that ultimately culminated in the deal—what he said and what you said, whatever it may be.

A. Mr. Sheldon telephoned me and told me he wished I would furnish them with a mutton. He said he would see that it was paid. I think, however, Mr. Louis Stevenson guaranteed payment for that mutton.

Mr. ORTON.—I move to strike out this answer of the witness, since it seems it was not a transaction with Mr. Sheldon at all but Mr. Stevenson.

The COURT.—I will allow it to stand; it is evidently preliminary. Motion denied.

Q. Who paid for that mutton?

A. The bank did.

Q. The bank, through what person?

A. Well, the only one who had charge of the affairs.

Q. Well, who? [21]

A. Mr. Sheldon did, and authorized us to deliver to the Thorsen Mining Company whatever they wanted—

(Testimony of S. W. Taggart.)

Mr. FULLER.—We object to any statement of the witness that any party authorized him to do anything without giving the conversation and words upon which said statement is made so that the Court and jury may judge whether there was any such authorization made.

The COURT.—Motion sustained; you will have to give the language Mr. Sheldon used in that regard.

A. He said to deliver to the Thorsen Mining Company whatever they might order, and bring the bills over to the bank “and I will pay them.” That is what he said.

Q. And now did you deliver anything upon that order? A. We did.

Q. Did you deliver goods to the Thorsen Mining Company? A. We did.

Q. Did you present your bills to the Alaska Bank? A. I did.

Mr. ORTON.—That is objected to as immaterial, incompetent, and immaterial. It is now shown that this conversation was oral, and not in writing, and therefore is invalid, and I move to strike out the answer of the witness concerning this transaction, all of it, for that reason.

The COURT.—Motion overruled.

Q. Did you present any bills to the bank?

A. I did—I did not present them myself but I had them presented.

Q. Where did you present these bills? [22]

A. To the Alaska Bank.

Q. And who paid them? A. The Alaska Bank.

(Testimony of S. W. Taggart.)

Q. To you?

A. I never saw the checks, but they were paid by the bank and at the bank.

Mr. ORTON.—We move to strike out the answer. Now, it appears that he never saw the checks himself, by his own answer. We move to strike out all the testimony relating to the payment of the checks by the bank, as it now appears that they were not paid to him, and that he never has seen the checks.

The WITNESS.—I will take that back. I did see the last check, because this controversy came up before the last check was deposited and I saw it.

Mr. ORTON.—We move to strike out everything except relating to the last check as hearsay.

The COURT.—Motion granted.

To which ruling of the Court an exception was taken by plaintiff and duly allowed.

Q. Now, tell us whether or not any credits were made at the bank on your account at the bank upon checks drawn at the bank?

Mr. ORTON.—That is objected to for the reason that it already appears that the witness does not know anything about any checks, except the very last one, that he never saw them and anything he may know or testify to is simply hearsay. Furthermore, the book itself is the best evidence of the credits made.

I saw one check, but I don't remember the amount of it. I did not personally deliver any of these [23] goods myself. I ordered them delivered, and know that the goods were delivered.

At this time the witness was withdrawn.

[Testimony of Geo. L. Marshall, for Plaintiff.]

Mr. GEO. L. MARSHALL, a witness produced on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination.

Mr. ORTON.—I desire to ask leave to make a motion now to strike out all of the testimony of Mr. Taggart, with reference to the conversations with Joe V. Sheldon, of the Alaska Banking & Safe Deposit Company with reference to ordering any goods, wares and merchandise on the ground that a cashier has no authority to bind the bank by any such conversation or agreement.

The COURT.—The motion will be denied.

The witness then testified as follows:

I am bookkeeper for the Pacific Cold Storage Company, and have held such position for over a year. I have full knowledge of the books of the Pacific Cold Storage Company in Nome. I was such bookkeeper during the months of January, February, March, April, May and June of this year, and up to the present time. I have here the original books of entry of the accounts of the Thorson Gold Mining Company; the items contained in this book are correct. (The witness then read the items of sales from February 11th, 1911, to and including June 23d, 1911.) The total amount of sales during that period being \$665, upon which credits are entered on March 7th and up to July 15th of a total of \$252.68, leaving a balance [24] due on the account of \$411.43. It was one of my duties to pre-

(Testimony of Geo. L. Marshall.)

sent bills and collect same. I presented bills for all the goods I have mentioned to Mr. Joe Sheldon at the Alaska Bank.

Thereupon the following proceedings were had:

Q. (By Plaintiff's Counsel.) And the credits that you have entered upon the books there, who paid them?

A. Well, the cash Mr. Sheldon paid. I think all of the credits which are entered there with the exception of the "beef returned" were all made to me by Mr. Sheldon after having sent them out to the mine to be returned and O.K.'d, and were then paid by Mr. Sheldon.

Q. All the credits with the exception of three items were paid to you?

A. Yes, all with the exception of the three items and this credit of "beef returned," Mr. Sheldon paid them all to me as far as I can remember, after Mr. Sheldon called me up and asked me to come over and get the money, after the bills were returned from the foreman at the mine, he having O.K.'d them, then Mr. Sheldon called me up and asked me to come around and get the money.

Q. Did you present the bills for this balance due there?

A. Yes; I gave him the bills June 27th; that was the last item I gave him, on July 1st. On July 1st I closed my accounts and I gave him the bill June 27th.

Q. Has that been paid, or any part of it?

A. No, sir.

(Testimony of Geo. L. Marshall.)

The witness then resumed: [25] There was an old balance on the Thorsen account of \$105.00, upon which \$50.25 was paid by Mr. Sheldon; that is not credited on the account; when Mr. Sheldon asked me to bring the bills into the bank on the first of every month, he says, "When we come to your bills we may pay on the old account, and we may not, but your bill will be paid from this time on"—this was on February 11th—"will be paid from this time on the first of every month." This \$5,025 was applied on the old account and is not included in the total to which I have testified. The above is the conversation when the bill was paid to me. When I collected the first bill Mr. Sheldon said they would apply it on the first account. As I remember all the bills were paid by Mr. Sheldon. I am pretty sure that all the payments were made by Mr. Sheldon, but could not be absolutely sure of that unless I saw the receipts that were given.

Thereupon the following proceedings were had:

Q. (By Plaintiff's Counsel.) And to whom did you hand the receipts for this Thorsen account?

A. Well, Mr. Sheldon took two of them, anyhow, whether he took any more I am not sure, but I am sure he took two of them—two receipts were made to him, the rest I am not clear of. While the bills were made out and given to Mr. Sheldon the first of every month, he rung me up and told me when to come over, and then I went over and collected them and gave him a receipt.

Q. And the reason they were not paid on presen-

(Testimony of Geo. L. Marshall.)

tation was under an arrangement made with Mr. Sheldon?

A. They had to go out to the claim to be O.K.'d by the foreman out there, and then came back to the bank [26] and he gave me a check for them. That was the procedure in every one of the bills that were paid.

On cross-examination the witness testified as follows:

I don't know whether he paid me in cash or paid me in check. When he gave me the payments I don't remember whether it was in check he made out or whether he paid me in cash and deposited the check to our balance. I do not know whether it was a check signed by the Thorsen Company, that I don't remember.

Thereupon the following proceedings were had:

Q. Well, do you remember whether upon any occasion he paid you a check signed in that manner?

A. Well, no, I could not say anything more now, if it was a check whether it was signed that way or not.

Q. Now isn't it a fact that he gave you every time a check signed Thorsen Company, in payment of your bill?

A. I could not swear to that because I don't remember.

Q. Then, you don't know whether it was a check signed Thorsen Mining Company, or not?

A. No, I do not.

(Testimony of Geo. L. Marshall.)

Q. It may have been a check signed by Thorsen Company? A. It may have been.

Q. It may have been checks?

A. It may have been.

Q. What became of the checks?

A. He has them, I presume.

Q. Have you any of the Thorsen Company checks?

A. I do not think so. [27]

Q. Were not all the payments made by Mr. Sheldon in the form of checks signed Thorsen Company, in pursuance of your arrangements with Mr. Sheldon? A. Not with my arrangement.

Q. They may have been all, however, signed Thorsen & Co.? A. They may have been, yes.

Q. You don't have any real recollection of ever having collected any one of them, have you?

A. Oh, yes, I have, because I entered them up.

Q. Aside from the entry there in your books, have you any recollection of how they were signed, or anything more than you entered the payments in your books there, on account of Thorsen & Company?

A. That is, I took the accounts and entered—the bills, or checks or money, whatever it was and entered it up in the account. That is about all I know about it; I have no very definite recollection of the transaction at all.

Q. Now, if you don't remember the kind of check you have no very distinct recollection whether or not he gave you a check or the money?

A. I do recollect something during the winter,

(Testimony of Geo. L. Marshall.)

one time his drawing a check—I think on a couple of occasions of accepting the check and depositing it with the deposits at the bank, but I don't recall just when that was.

Q. Is it not a fact that you just presume it was paid by check?

A. I know on one or two occasions he gave me the checks and of drawing upon the account there in the bank, [28] but the character or amount of the checks, or how they were signed, I have no recollection of the particulars at this time. This ledger does not show the account in the beginning, the balance is just carried forward in this ledger.

Q. Now, there is nothing in this account here to indicate where this account begins or anything where it ends?

A. No, sir, only that I know where it begins, because it is brought forward from another ledger.

Q. It is carried right along under the name of Thorsen Mining Company? A. Yes, sir.

Q. And nowhere indicates any change in the account, in the name of the account, from the beginning? A. No, sir.

Q. Nowheres indicating that there was any change in the arrangements, you say, about who were to pay for the goods?

A. Not on the account itself.

Q. No change at all but is carried right along in the same name without the introduction of any change in the name of the account whatsoever.

A. Yes, sir.

(Testimony of Geo. L. Marshall.)

Mr. ORTON.—In connection with the cross-examination of this witness, we desire to offer this account on pages showing the account in the name of “Thorsen Mining Company,” commencing on the preceding pages, and continuing clear to the end of the account.

Mr. BRUNER.—We have no objection.

(Pages referred to received in evidence and marked Defendant’s Ex. No. 1 and exhibited to the [29] jury.)

Mr. BRUNER.—I will ask that the last two pages be admitted as Plaintiff’s Exhibits “A” and “B.”

(Pages referred to marked Plaintiff’s Exhibits “A” and “B,” received in evidence and exhibited to the jury.)

Q. Were these goods delivered to Thorsen & Company?

A. No, they were sent down to Billy Rowe’s and he sent them out to the mine.

They were sent down to Billy Rowe’s on orders from the claim.

The witness thereupon identified the first item paid on account to the Pacific Cold Storage Company, being for the sum of \$93.25.

(Paper handed witness.)

Q. Is this the check that was paid by the bank for that credit? A. Yes, I should think it was.

Q. That check is signed “Thorsen Company,” is it not?

A. Yes, sir, signed Thorsen Mining Company, “Sheldon.”

(Testimony of Geo. L. Marshall.)

Q. Never mind; I just asked you if the check was signed Thorsen Company? A. Yes, sir, it is.

Q. Now, when this check was paid to you, you took it over to your store and deposited it along with your other checks, in the usual manner, did you not? A. In the usual manner, yes, sir.

Mr. ORTON.—We offer this check in evidence as being the check received by plaintiff Pacific Cold Storage Company in payment for goods received by Thorsen Mining Company.

(Paper referred to received in evidence [30] together with the endorsement thereon, marked Deft.'s Exhibit #2, and read to the jury as follows:

[Defendant's Exhibit No. 2—Check.]

“Nome, Alaska, Mar. 10, 1911. No. 5.
THE ALASKA BANKING & SAFE DEPOSIT CO.

Pay to P. C. S. Co. or ~~bearer~~ \$97.23
Ninety-seven and 23/100 Dollars.

THORSEN & CO.

S.

Endorsed on back: For deposit to the Credit of
PACIFIC COLD STORAGE CO.”

The witness then identified the check for the next item of credit, being dated May 2d, 1911, for \$84.43; also item of credit of \$104.35; all these checks are signed in the same way.

Mr. ORTON.—I offer these checks with their endorsements in evidence.

Papers referred to received in evidence, marked Deft.'s Exhibits Nos. 3 and 4, and were as follows:

(Testimony of Geo. L. Marshall.)

[Defendant's Exhibit No. 3—Check.]

“Nome, Alaska, 4/27, 1911. No.

THE ALASKA BANKING & SAFE DEPOSIT CO.

Pay to P. C. S. CO. or order.....\$84.43

Eighty four and 43/100 Dollars.

THORSEN & CO.

S.

Endorsed: For deposit to the credit of PACIFIC
COLD STORAGE CO.”

[Defendant's Exhibit No. 4—Check.]

“Nome, Alaska, May 23, 1911. No. 19.

THE ALASKA BANKING & SAFE DEPOSIT CO.

Pay to P. C. S. Co. ~~or bearer~~.....\$104.35

One hundred four and 35/100 Dollars.

THORSEN & CO.

S.

Endorsed: For deposit to the credit of PACIFIC
COLD STORAGE CO.” [31]

Q. So as a matter of fact these three payments
which you have testified to were all made to you in
check? A. Yes, sir.

Q. And not in cash? A. Yes, sir.

Q. Having refreshed your recollection now by
seeing these checks you are able to say that that is
a fact? A. Yes, sir.

Q. State whether or not they were paid to you in
the same manner that other bills and taken to the
office and deposited with your other checks.

A. Yes, sir.

Q. In the ordinary course of business?

A. Yes, the same as we do everything else.

(Testimony of Geo. L. Marshall.)

Q. Mr. Marshall, you say these supplies were ordered from the claim, some by telephone, somebody from the claim would telephone and personally give the orders? A. Yes, sir.

Q. Some party, the foreman probably, from Thorsen Mining Company, telephones in the orders from the claim?

A. I don't know as to that; the orders were left at the office, after the butcher takes them.

Q. They came by telephone or somebody coming personally from the claim?

A. I don't know whether they came personally or not.

Q. You don't ever take orders yourself. You don't remember of ever taking any of these orders yourself, do you?

A. No, I don't remember but I may have taken them; I sometimes take the orders, but I don't remember whether I ever took any of these particular orders or not. [32]

**[Testimony of S. W. Taggart, for Plaintiff
(Recalled).]**

Mr. S. W. TAGGART, recalled by the plaintiff in chief, testified as follows:

(Paper handed witness.)

I identify the paper handed me; this is the assignment of this account to W. J. Rowe.

Paper referred to was received in evidence, marked Plaintiff's Exhibit "C," and was as follows:

**[Plaintiff's Exhibit "C"—Account Assigned to W.
J. Rowe.]**

"Nome, Alaska, July 1, 1911.

M. Thorsen & Co.,

**BOUGHT OF PACIFIC COLD STORAGE COM-
PANY,**

General Cold Storage, etc.

Feb.	11.	Mutton	54	13.50
	17.	Hind $\frac{1}{4}$ Beef	149	33.53
Mar.	7.	Fore $\frac{1}{4}$ "	189	42.53
	14.	Mutton	47	11.75
	30.	Hind $\frac{1}{4}$ Beef	134	30.15
Apr.	7.	Mutton	45	11.25
	17.	Fore $\frac{1}{4}$ Beef	170	38.25
		1 cs. eggs		12.50
	22.	Mutton	41	10.25
	25.	Hind $\frac{1}{4}$ Beef	145	32.63
May	8.	Fore $\frac{1}{4}$ "	179	40.28
		Mutton	58	14.50
	17.	Hind $\frac{1}{4}$ Beef	133	29.93
		Mutton	53	13.25
	23.	Fore $\frac{1}{4}$ Beef	198	44.55
	29.	Mutton	52	13.00
		1 cs. eggs		12.50
	31.	Bacon	34	15.30
		Butter	8	4.00
		Hind $\frac{1}{4}$ Beef	160	36.00
June	5.	Fore $\frac{1}{4}$ "	142	31.95
		Bacon	39	15.60

(Testimony of S. W. Taggart.)

June 10.	Hind $\frac{1}{4}$ Beef	156	35.10
12.	“ “	177	39.83
17.	Fore $\frac{1}{4}$ “	159	35.78
	Mutton	43	10.75
23.	Hind $\frac{1}{4}$ Beef	162	36.45
			<hr/> 665.11
Mar. 9.	By Cash on a/c Feby.	47.03	
May 2.	“ Mar.	84.43	
July 3.	Beef ret'd 75	16.87	252.68
23.	“ Apr.	104.35	
			<hr/> 412.43

Balance due 412.43
 For value received the above and foregoing account is hereby assigned to W. J. Rowe. [33]

PACIFIC COLD STORAGE CO.

S. W. TAGGART, Mgr.

Dated Nome, Alaska, July 17th, 1911.”

Q. Did you have any conversation with Mr. Sheldon with reference to the balance of the account, of this account? A. I did.

Q. When did you have that conversation?

A. The last conversation I believe was the middle of June, about the middle of June, sometime.

Q. And at that conversation—did it have reference to the account of the Thorsen Mining Company?

A. Entirely.

Q. After February 11th, what was your reason for continuing the account in the name of Thorsen Company?

A. Because there was a balance on the old account, and which they promised to take up at times when

(Testimony of S. W. Taggart.)

they could do so as they went along.

Q. A balance of what?

A. A balance on February 11th of some hundred dollars, which they promised to pay along with the bills for goods which were ordered at a time subsequent to February 11th, and they did pay some fifty-eight dollars on the old account.

Q. Was that your reason for continuing the account in their name?

A. That was one reason, yes, sir.

Q. Was there any other reason?

A. To keep track of the account, and as much as anything else in order to give them the benefit—beef is sold [34] by the quarter—front and hind, and we wanted to give them the benefit of their previous purchase, and give them the hind quarters as they would have gotten on their old account—for instance, a new account is opened up we usually begin the account with the fore quarter, to start with, and inasmuch as the hind is worth more than the front, we wanted to give them the benefit of their previous purchases, and on that account, to keep track of the account, and on account of this old balance which they promised to pay, that it would be paid as we went along.

Q. Did you have any conversation with Mr. Sheldon with regard to the delivery of goods to Thorsen Company? A. I did.

Q. When—at about what time?

A. About February 11th.

Q. What was the conversation you had with Mr.

(Testimony of S. W. Taggart.)

Sheldon in reference to the delivery of goods to Thorsen Company.

A. Mr. Sheldon came up to the Pacific Cold Storage Company's office and informed me that he had taken a mortgage on the Thorsen & Company outfit, on the dump that they had already taken out and whatever there was to be taken out, and we should furnish them with anything that they required, bring the bills to the bank "And I will pay them."

On cross-examination the witness testified:

That was about February 11th (referring to above conversation); somewhere about that time we reached [35] the understanding; the deal had been on for a week or so, and I would not state that any one of these conversations occurred at any one particular time, because there were several different conversations took place at several different times, and I won't state the particular date of any one of them. The closest I can get is that it was about the 11th of February. I did not say that I had all these conversations with Mr. Sheldon over the telephone, because I did not. I would not segregate the conversations because I don't remember them apart.

Thereupon the following proceedings were had:

Q. Now, you testified this morning that Mr. Louis Stevenson guaranteed a certain mutton, didn't you?

A. Yes, sir.

Q. And did Mr. Stevenson pay for it?

A. No, sir.

Q. And is that included in this bill here?

A. Yes, sir, I think it is.

(Testimony of S. W. Taggart.)

Q. Why did you include this in this bill if it was prior to this conversation you have detailed.

A. Because they had to eat in the meantime, you see, while this investigation and experting of the mine was taking place, and this mutton Mr. Stevenson said if the bank didn't pay for it, if the deal didn't go through, and if the bank didn't take the mortgage that he would personally pay for it himself.

Q. So as a matter of fact this mutton was furnished to Thorsen Company, sold to them, prior to the time of this conversation wherein Mr. Sheldon said to you "I will pay for it"? A. Yes, sir. [36]

Q. Or words to that effect? A. Yes, sir.

Q. Now, after February 11th you continued to charge off the goods delivered to Thorsen Mining Company up in your books in the usual manner, did you not? A. Yes, sir.

Q. You made no segregation of the account at all?

A. No, sir.

Q. Of course, you naturally expected Thorsen Mining Company to pay, didn't you? A. No, sir.

Q. You didn't expect them to pay you?

A. No, sir, I did not expect the Thorsen Mining Company to pay us.

Q. Well, now, Thorsen & Company did pay you on the first of each month, did they not, gave you their check on the first of every month, did they not?

A. After the February bill?

Q. Yes, after the February bill Thorsen & Com-

(Testimony of S. W. Taggart.)

pany paid you with their own check, did they not?

A. No, sir, they did not; the Alaska Bank paid us.

Q. But they were signed by the Thorsen Mining Company were they not?

A. Yes, they were signed by the name of Thorsen Mining Company, by Sheldon, they were written by Sheldon—

Q. —Signed by the Thorsen Mining Company?

A. Yes, sir.

Q. Well, now, you knew it was their check?

A. No, sir, I did not; it was written by Joe Sheldon.

Q. Well, you know that of course while Mr. Sheldon may have written the checks they were signed by Thorsen [37] Mining Company, and were their checks?

A. No, sir, I don't know anything except what I have been told.

Q. You say you saw one check? **A. Yes, sir.**

Q. You didn't look at it, of course, and you don't know whether they were Thorsen checks or not?

A. I know that so long as the bank was responsible I didn't pay any attention to how the checks were signed. I know the checks have been received and we have received credit at the bank. I didn't go over every individual check as to how the payments were made.

Q. But you never released Thorsen & Company from the payment of these bills?

A. I never considered that Thorsen & Company owed me a cent.

(Testimony of S. W. Taggart.)

Q. Why did you charge them to them?

A. Well, I never looked the record over.

Q. All you know is that the bills were paid?

A. Yes, sir.

Q. And that you got them out of Thorsen Company?

A. I don't know who they came out of; the book-keeper made out the bills.

Q. Then, you don't know very much about these bills of your own knowledge, do you?

A. He makes out the bills—that is his business to make out the bills and collect them.

Q. Well, the same with Thorsen & Company as others, did he make out the bills and collect them?

A. Yes, sir, that is as far as I know. I don't know anything [38] more about bills that are paid. I know when they are not paid however. I keep track of those bills very closely; in fact, there is a list made out every morning and put on my desk, if not I go to the ledger and find out what bills are paid—but I don't have even to do that because this list is made out and on my desk at a certain time every month, and any bills that are not paid I go over them and see they are paid.

Q. Was Thorsen Company on this list?

A. Yes, sir.

Q. Now, you say the Alaska Bank paid some of this old balance?

A. Paid fifty dollars, something like that, on the old balance.

Q. When?

(Testimony of S. W. Taggart.)

A. When the first payment was made after the arrangement. The old balance was something in the neighborhood of one hundred dollars, I believe.

Q. What business was Mr. Sheldon doing about that time—he was cashier of the bank, was it not?

A. I do not know anything only that he was in charge of the bank.

Q. You have bought drafts signed “J. V. Sheldon, cashier,” have you not?

A. I have never bought more than two or three drafts at the bank, maybe three or four. I have bought drafts and exchange for the company, but I have had nothing to do with the bank personally, at all.

Q. Well, you have bought two or three? [39]

A. I may have bought one or two small drafts.

Q. And they were signed “J. V. Sheldon, Cashier,” were they not?

A. I would not swear how they were signed.

Q. Well, you know that he was cashier of the bank, do you not? A. Yes, sir.

On redirect examination the witness testified:
(By Mr. BRUNER.)

Q. What, if anything, do you know about who was in charge of the bank’s affairs?

A. I know absolutely nothing about him, only that he was manager and cashier, or what he was, only inasmuch as he was running the bank, and that was all I did know.

Q. Well, what I mean is, so far as any other person that you did business with at the bank, with re-

(Testimony of S. W. Taggart.)

gard to any affairs except him? A. That was all.

Q. Mr. Sheldon was the only person, was he?

A. Yes, sir, that is all.

Q. Was there any other person in the bank to do business with except him?

A. I never talked this over in the bank; it has all taken place in our own office until after this question arose. Since then we have discussed it in the bank several times.

Q. Now, you was asked with regard to this first bill, which was made before the final arrangement, before you had the conversation with Mr. Sheldon with regard. [40] to his paying the bills. Was that in relation, or did it have relation to the Thorsen bill?

A. This first bill, when this first mutton was included that was the first payment. I believe the first payment was made for Mr. Stevenson's order, which the bank paid.

On recross-examination the witness testified:
(By Mr. ORTON.)

Q. When you say the bank paid it you mean that you were paid by the checks that were offered in evidence, that is what you mean, is it not?

A. Why paid at the bank.

Q. You don't know who paid it?

A. No, I know that it has been paid. I know that we received three payments; I know that.

The payments were by the three checks that have been introduced in evidence. I know Mr. Bryant; he is the general manager of our company. He was

(Testimony of S. W. Taggart.)

in Nome, in the month of June. I remember an occasion when Mr. Bryant, Mr. Sheldon and Mr. Thatcher and myself were together in the office of the Alaska Banking & Safe Deposit Co., some time in the month of June, and we had a conversation with reference to this matter.

Q. Is it not a fact that you stated at that time in the presence of Mr. Sheldon, Mr. Thatcher and Mr. Bryant that you did not know anything about the matter personally?

A. No, sir, I never made that statement because I knew a good deal about it. [41]

Q. Did you not state in substance and effect at that time that you had never had any conversation personally with Mr. Sheldon with regard to who was to be responsible for this bill?

A. No, sir, I never did.

Q. Did you not state in substance, at that time, and in the presence of Mr. Bryant, Mr. Sheldon and Mr. Thatcher, that you never had any conversation with Mr. Sheldon about it, that whatever was done about it was done by Mr. Marshall?

A. No, sir; I never did.

On re-redirect examination the witness testified:
(By Mr. BRUNER.)

Q. In regard to this Stevenson bill—let me ask you, did you have any conversation with Mr. Sheldon with regard to Mr. Stevenson's bill, and the way it was ordered?

A. Yes, sir; I phoned to Mr. Sheldon about it.

Q. State what was said in reply by Mr. Sheldon.

(Testimony of S. W. Taggart.)

A. I told him that Louis Stevenson had explained to me that they were going to expert the mine, and in the meantime he was going to order this mutton for the company, and if the bank didn't pay it, he would. Mr. Sheldon said, "Go ahead and give him the mutton and it will be taken care of by the bank, any way."

(By Mr. ORTON.)

Q. Why did you do that? Were you not satisfied with Mr. Stevenson, wasn't Mr. Louis Stevenson good for this mutton—wasn't Mr. Stevenson's word or credit good for that much credit? [42]

A. I am not sure but what I called up—I would not be just positive that I called up, or why if I did I called up. I am not positive about that now.

Q. You were not satisfied, then, with Mr. Louis Stevenson's guarantee?

A. It was in reference to further credit.

Q. Then it was not in reference to this mutton you are speaking about now that Mr. Louis Stevenson guaranteed?

A. I was absolutely satisfied with Mr. Stevenson's guarantee, but there was something else in connection with the business we talked about at the same time.

(Witness excused.)

[Testimony of W. J. Rowe, on His Own Behalf.]

Mr. W. J. ROWE, plaintiff, being duly sworn testified as follows:

Direct Examination.

(By Mr. BRUNER.)

I am a teamster and dealer in lumber also. I know the Thorsen Mining Company. I commenced doing business with them about two years ago, and continued to do their hauling work and so on until some time in the month of January, 1911, this last January, and at that time their bills went up to something like \$386, which were not paid, and I came in one afternoon and there was an order for a load of coal amounting to some seventy or eighty dollars, and I shut down the credit of the Thorsen Mining Company at that time. About a week or so after that I went up to the Alaska Bank and I told Joe Sheldon that I had shut down on the Thorsen Mining Company, and that I was going to attach them, and he said it wouldn't do me any good [43] because they had a mortgage signed by the Thorsen Company, but he said that possibly in a little while he would be able to take care of my account with the Thorsen Mining Company. In the mean time one of the Thorsen Mining Company came along and paid for a load of coal, cash. The next load Mr. Stevenson guaranteed. I went into the Alaska Bank a few days after that and Joe Sheldon told me to bring my bills in to him from that time on and he would pay them; that was in February, I don't know exactly the date, but about somewheres along about the first of March, finally,

(Testimony of W. J. Rowe.)

the first of March I took in my bill and I left it there for a few days, for probably a week, and then I went in and got my money for the Thorsen Mining Company account from Mr. Sheldon in the Alaska Bank.

Q. What instructions, or what directions, if any, were given you by Mr. Sheldon as to the deliveries that were delivered after that time?

A. Previous to that time or after?

Q. No, after that time.

A. He told me at the end of the month I should take the bills into the bank and he would pay them, and also pay what he could on the previous back bill which I was going to attach them for. He then paid one bill to myself, and paid the two for the following months, I think, to the bookkeeper. The third bill was paid, but the fourth month was not paid.

Mr. BRUNER.—I now offer Plaintiff's Identification "A" in evidence.

Mr. ORTON.—To which we object on the ground that it is incompetent, irrelevant and immaterial and [44] not binding upon the bank.

The COURT.—Objection sustained.

To which ruling of the Court the plaintiff then and there excepted, and an exception was allowed.

[Recital Concerning Plaintiff's Identification "A."]

Said Plaintiff's Identification "A," so offered, as aforesaid being a Chattel Mortgage from H. Thorsen et al. to the Alaska Banking & Safe Deposit Co., and hereafter set out in full as Plaintiff's Exhibit "D." [45]

The witness then resumed: I had no further conver-

(Testimony of W. J. Rowe.)

sations with Mr. Sheldon with reference to the Thorsen Mining Company, from the time I talked to Joe Baumgarten who was in charge of the mine.

The only bookkeeper I have is Charles Milot, and I am not as familiar with the books as he is. My account against the bank is for hauling, lumber, coal and crude oil, about \$300 is for hauling, the balance of the account was for oil and coal. One of the payments was made to me personally by Mr. Sheldon, and there were several payments made to Mr. Milot, my bookkeeper.

On cross-examination the witness testified:

(By Mr. ORTON.)

I had an account in my books against the Thorsen Mining Company; had an account with them for about a year and a half—it was a running account.

Q. Now, at this time you claim to have had this conversation with Mr. Sheldon, you kept right on doing hauling for the Thorsen Mining Company?

A. No, sir, not until Mr. Sheldon said he would pay the bills the first of every month.

Q. And you said you would continue to furnish them with such supplies and hauling as before?

A. Yes, after Mr. Sheldon promised to pay the bills.

Q. Now, when was that?

A. Sometime in February, 1911.

Q. And after that you continued the account and it then ran right along the same way in the name of the Thorsen [46] Mining Company?

A. Yes, sir.

(Testimony of W. J. Rowe.)

Q. Continued to do hauling for them on credit?

A. No.

Q. Well, you furnished them goods on credit the same as you had theretofore?

A. No, sir, we shut down their credit.

Q. That was after this conversation with Mr. Sheldon? A. Yes, sir.

Q. You then furnished them with goods on credit, and to do hauling for them on credit, the same as you had theretofore done, did you not?

A. With the promise of Sheldon, we promised to furnish them credit for thirty days. Previously I had been only giving them two weeks' credit.

Q. Mr. Sheldon guaranteed their credit for thirty days?

A. He told me to bring the bills to the bank and the account would be paid the first of every month.

Q. After this conversation you had with him then you continued to do hauling for them and furnish them goods on credit for thirty days—Thorsen Company? A. Thorsen Company, no.

Q. I say you continued to furnish them goods, Thorsen Mining Company, on credit, they didn't pay cash, did they for the goods after that?

A. No, sir, absolutely no; not on Thorsen Company's credit.

Q. Well, they didn't pay cash after that time for what goods they got, did they?

A. Yes, I was paid at the end of the month from Joe Sheldon, for the next two months.

Q. So Mr. Sheldon extended their credit from two

(Testimony of W. J. Rowe.)

weeks [47] to thirty days, did he?

A. No, sir, not with me, not one hour.

Q. Isn't that what you said a moment ago?

A. No, sir.

Q. Did you not testify in your deposition as follows: (Reads:) "Q. You never charged anything in your books to the Alaska Banking & Safe Deposit Company, did you? A. No, sir. Q. Never made an entry in your books of account against them, did you? A. Oh, yes, we have several entries against them. Q. I mean against this account? A. No."

Q. Now, I will ask you, Mr. Rowe, if you have any entry on your books against the Alaska Banking & Safe Deposit Company?

A. Yes, sir, as I stated there we have several entries against them.

Q. On this account?

A. No, not directly in their name.

Q. Well, you have no account against the bank of any kind on this account? A. No.

Q. Of course, you sometimes hauled a load of coal or hauled assay supplies to the bank, something of that sort? A. Yes, sir.

Q. Hauling the same manner you do for almost everybody about town? A. Yes, sir.

Q. When I refer to an entry in your books against the bank I am not speaking of anything save in connection with the Thorsen Mining Company account. Now, you [48] have never made an entry in your books against the Alaska Banking & Safe Deposit Company, in connection with this Thorsen account?

(Testimony of W. J. Rowe.)

A. No, sir.

Q. Now, when your deposition was taken in this case I will ask you if you testified as follows (reads):

“Q. Have you an account on your books for any merchandise sold the Alaska Banking & Safe Deposit Company? A. No, not directly. Q. Have you an account with the defendant, the Alaska Banking & Safe Deposit Company? A. Not with the bank; the account of \$384.00, it was guaranteed by the bank.” Did you make that answer? A. Yes, sir.

Q. (Reads:) “Q. You have an account on the books for goods sold to the Alaska Banking & Safe Deposit Company? A. No, not directly, but to Thorsen & Company. Q. Have you an account on your books for merchandise sold the Alaska Banking & Safe Deposit Company? A. No, not directly. Q. Do your books show anything to them indirectly? A. They don’t show it in the name of the Alaska Banking & Safe Deposit Company. Q. Your books don’t show you sold anything to the Alaska Banking & Safe Deposit Company? A. No.” Did you make those answers to those questions?

A. Yes, sir, I made those answers.

Q. Did you make these answers to the following questions (reads:) “Q. Who did you talk to there” (referring to the Alaska Banking & Safe Deposit Company)? A. Joe Sheldon. Q. When was that? A. In February, a Saturday afternoon, I don’t remember the date. Q. Saturday [49] afternoon, I don’t remember the date. Q. Saturday afternoon? A. Yes. Q. State what was said to you then of the

(Testimony of W. J. Rowe.)

Thorsen outfit. A. Nothing more than I had said I wasn't going to carry them any longer. Q. What did he say? A. He said, 'We are going to protect you business men and take care of the bills of the Thorsen Mining Company from now,' and he also said he might pay the back account, but he asked me at that time to charge the back bill; he said he might take care of the back bill, but that he wouldn't promise that. Q. That was all that was said, was it? A. Yes, to my knowledge." Did you answer those questions in that way? A. Yes, sir.

Q. Now, on the next page of your deposition (reads): "Q. You don't know what time in February, that was? A. No, I don't know the date except I think I could tell by looking at the bills. Let me see, this Thorsen one—this was paid here (indicating January 29th) I know it was some time in February, I know it was in February, I am confident of that by the bills. Q. You have stated all that occurred between you and Mr. Sheldon, at that time, have you? A. Yes, that's about all." Did you answer that question in that way?

A. Yes, I answered that way. I knew it was the Thorsen Mining Company and not the bank that was operating this mine out there. I have given above all the conversation I recollect that I had with Mr. Sheldon.

Q. (Reading from deposition:) "And you have given all the conversations you ever had with any one representing [50] the bank with reference to contract or payment?

(Testimony of W. J. Rowe.)

A. All that I said, that he agreed to take care—Joe Sheldon agreed to take care of the business men furnishing anything—oh, I might have had several little conversations, more or less, no agreement at all.” Did you make those answers to those questions? A. Yes, sir.

Q. Now, after Mr. Sheldon had this conversation with you, the Thorsen Mining Company went right along and ordered things in the same way—now—who ordered the goods?

A. Well, Gus. Lynell, most of the time, sometimes different parties.

Q. You filled the orders, did you? A. Yes, sir.

Q. And charged them to the Thorsen Mining Company on your books? A. Yes, sir.

Q. And, of course, you naturally expected Thorsen and Company to pay you, didn't you? A. No, sir.

Q. You did not?

A. No, sir; I expected Mr. Sheldon to pay them. I shut down on Thorsen Company's credit previous to that.

Q. And you never looked to anybody else at all for this money? A. No, sir, I did not.

Q. Now, didn't you testify in your deposition that if Thorsen and Company had paid you a thousand dollars you would have stood the balance of the loss yourself and would not have looked to the bank?

[51]

A. Thorsen and Company never promised to pay me a thousand dollars.

I don't know of my own knowledge that Baum-

(Testimony of W. J. Rowe.)

garten represented the bank at the mine. He told me he represented the bank. All I know about him representing the bank is what he and other people told me. I went out to the mine about getting my money. I knew that was not the office of the bank where they paid out money.

Q. Mr. Sheldon was the man that you claim had promised that he would take care of the bills?

A. Yes, sir.

Q. And notwithstanding that you went out to the mine to see if you could get your money, to try and get your money?

A. After Mr. Sheldon refused to pay them, I did.

Q. Did you ever demand your money from Mr. Sheldon? A. No; my bookkeeper did.

Mr. ORTON.—Move to strike out the answer, except the last part, except “No, sir,” as it is not responsive.

The COURT.—Motion sustained.

To which ruling of the Court plaintiff duly excepted and an exception was allowed.

Q. I asked you if you ever demanded your money from Mr. Sheldon?

A. No, not at that time. I never demanded my money; no.

Q. At that time you had not demanded your money from the bank?

A. No, sir, I had not. When I went out to the mine I found Joe Baumgarten in possession of the claim, and afterwards he [52] promised to pay me one thousand dollars on account. When I first

(Testimony of W. J. Rowe.)

went out to the mine Baumgartner promised to pay me something on account, subsequently he promised to pay me one thousand dollars.

Q. But at that time, of course, you didn't look to anybody but the bank for your money?

A. Well, I was looking to the bank or their agent.

Q. But you didn't look to anybody but the bank or somebody representing the bank? A. No, sir.

Q. Didn't you testify at the time your deposition was taken, as follows (reads): "If they had paid me that thousand dollars I wouldn't have brought suit?"

A. I did.

Q. Notwithstanding the fact that you never looked to anybody but the bank and that they owed you, or you claimed that they owed you about seventeen hundred dollars, if they had paid you a thousand dollars you would never have said anything more about it?

A. That is the idea; yes, sir. A considerable amount of my claim is for oil delivered in drums. I paid Sesnon Company for this oil myself.

Q. Why was it, Mr. Rowe, that you were willing, if you never held anybody else responsible for this account except the bank, that you were willing to take a thousand dollars, so much less, than your whole account?

A. I figured that the attorneys would get the balance and I might as well divide it up with the bank as to give it to the lawyers. [53]

Q. Is that your only reason?

A. That is about the only reason; yes.

Q. You were very friendly with them at the time,

(Testimony of W. J. Rowe.)

were you not? A. Yes.

Q. Now, you say Joe (Sheldon) had promised to pay this? A. Yes, he did.

Q. You have never even demanded it, have you?

A. I never knew until last week that it was necessary, and from the way the whole thing ended I didn't know as it would do any good, anyway.

Q. You never even talked the matter over with them that you were willing to take this thousand dollars, at any time?

A. No, sir, I never made any demand.

Q. But you never spoke even to the bank that you were willing to take a thousand dollars—just went ahead and brought suit against them?

A. I brought suit, yes, sir.

Q. Of course, if you could have collected it from Thorsen Company you would have taken the full amount, would you not?

A. I certainly would, yes, sir.

Q. And would even now?

A. I would be tickled to death to.

Q. You testified, I believe, that these payments were made to you by Mr. Sheldon, did you not?

A. Not all of them; no.

Q. Who else made any besides Mr. Sheldon?

A. Oh, yes, Mr. Sheldon made the payments to me, yes, sir. [54]

Q. Pay them in cash?

A. Well, I rather think not; I ain't clear on that.

Q. Well, if he didn't pay you in cash, how did he pay you? A. By a check.

(Testimony of W. J. Rowe.)

Q. Whose check, do you know?

A. His own—well, I really don't know whether there was a check or cash.

Q. Did he make payments to you personally?

A. One of them; yes, sir.

Q. When was that?

A. Oh, sometime in March.

Q. Was that paid to you in check or in cash?

A. I ain't sure about that.

The witness thereupon identified paper handed to him as being a check paid to him on the account of Thorsen Mining Company.

Q. Now, Mr. Sheldon paid you by checks signed Thorsen Mining Company, didn't he?

A. Yes, sir.

Mr. ORTON.—We offer this check in evidence as being the check paid to Mr. Rowe, together with the endorsements thereon.

(Paper referred to received in evidence and marked Defendant's Exhibit No. 5, being as follows:)

[Defendant's Exhibit No. 5.]

“Nome, Alaska, Mar. 11, 1911. No. 6.

THE ALASKA BANKING & SAFE DEPOSIT
CO.

Pay to W. J. Rowe, ~~or bearer~~ \$305.00 Three hundred five and no/100 Dollars.

THORSEN & CO.

S.

Endorsed: W. J. ROWE.” [55]

There were two other payments but they were not made to me personally.

(Testimony of W. J. Rowe.)

On redirect examination the witness testified as follows:

When I testified that I knew it was the Thorsen Mining Company and not the bank operating out there, I referred to the time I was going to attach them, that was the latter part of January or the first part of February. I continued the account in the name of the Thorsen Mining Company, for the reason that the account was running that way, and it didn't seem necessary to change it, and also as the Alaska Bank had a private account on my books.

Q. After you stopped the credit of the Thorsen Company, did you ever at any time after that extend any credit to the Thorsen Company?

Mr. ORTON.—That is objected to as incompetent, irrelevant and immaterial, and not the proper way to prove accounts, and calls for a conclusion of the witness.

The COURT.—I think the witness may state the facts and allow the jury to draw their conclusions from the facts; this question calls for simply a conclusion of the witness.

A. No, sir, I did not.

Mr. ORTON.—Your Honor sustained the objection to the last question and I would ask that the answer of the witness be stricken out.

The COURT.—It may be stricken out.

To which ruling of the Court the plaintiff [56] duly excepted and an exception was allowed.

Q. Did you, after that time in January that you have spoken of, did you extend any credit to the

(Testimony of W. J. Rowe.)

Thorsen Mining Company?

Mr. ORTON.—I understand your Honor has just this minute stricken that out. We object on the same grounds.

The COURT.—Objection sustained.

To which ruling of the Court the plaintiff duly excepted and an exception was duly allowed.

At the time I went out to the mine and had this conversation with Mr. Baumgarten my bills had been presented to Mr. Sheldon, but they have not been paid; if they had paid me a thousand dollars I would not have commenced suit.

In my deposition I testified that Baumgarten promised to pay me a thousand dollars, but he said he had no money or authority to pay me that sum. He stated he had paid the money out for labor. If they had paid me that thousand dollars I wouldn't have brought suit, I would have stood the loss of the rest—I testified to that.

On recross-examination the witness testified:

I testified when my deposition was taken that the Thorsen bill was the only one that I had had trouble about, but that I didn't consider that a loss as yet.

Q. Why did you use that expression, "I said the Thorsen bill was the only one I had trouble with"—you never had any trouble with the bank over it, had you?

A. Well, the trouble I referred to I had shut down on their credit; that was the only trouble I had; that [57] had nothing to do with this trouble, of course.

Q. What did you mean by "You didn't consider

(Testimony of W. J. Rowe.)

that a loss yet." You knew, of course, any loss was good for would be paid, didn't you?

A. Well, I never believed there would be a loss; no.

Q. Now, you were hoping, of course, that in the course of time Thorsen Company would pay, and that you would not lose any money, because you knew, of course, there would be no trouble with the bank, that the bank would pay?

A. If it was paid, I would rather, of course, that Thorsen Company had paid instead of the bank.

Q. You were hoping that the deal with Thorsen Company, would turn out all right, knowing that if it didn't you would never be paid, because they were the parties you were doing business with; isn't that the fact?

A. No, I was not losing any sleep over that.

Q. You were hoping that were you not, all the time?

A. No, sir, I was not hoping anything of the kind.

On re-redirect examination, the witness testified:

I had trouble with the Thorsen Company about that prior bill at the time I shut down on them, a prior account of \$384 or \$386, that is not included in this suit. That is still due and unpaid.

On re-recross-examination the witness testified:

That account runs right along on the books. Sheldon didn't promise he would pay the previous bill; there is no real segregation of the account. [58]

**[Testimony of Joe V. Sheldon, for Plaintiff
(Recalled).]**

Mr. JOE V. SHELDON, recalled by the plaintiff, testified as follows:

Direct Examination.

(By Mr. BRUNER.)

Q. Mr. Sheldon, you conducted certain negotiations in reference to the Thorson Company account with Mr. Rowe, and Mr. Taggart, did you not?

A. How do you mean?

Q. You had business connections with them in regard to it?

A. Otherwise than Billy came in to see me once.

Q. Well, you had some negotiations with them concerning this matter once anyhow, did you not?

A. You would not call them negotiations; no.

Q. Did you have any business connection with the Thorsen Mining Company? A. Yes, sir.

Q. Did you have conversation with Mr. Taggart with reference to supplying merchandise to Thorsen Mining Company? A. I don't think so.

Q. Will you say that you did not?

A. He once told me that he (Taggart) never had any with me—

Q. I will ask you if you will say that you did not have any talk with him in regard to that.

A. I don't think I did. I did not go to Mr. Taggart's office in the month of February in reference to the Thorsen Mining Company's affairs; the bank had an account with the Thorsen Mining Company. On behalf of the bank I negotiated a mortgage from

(Testimony of Joe V. Sheldon.)

the Thorsen Mining Company, and signed [59] the mortgage on behalf of the bank, and caused it to be filed for record in the Recorder's Office.

Q. At that time did you know that Mr. Taggart and Mr. Carleton and Mr. Rowe, had refused further credit to the Thorsen Company?

Mr. ORTON.—That is objected to as incompetent, irrelevant and immaterial, and not binding upon the bank.

A. I don't know whether it was prior to that date or whether it was after that date or not.

Q. I didn't ask you about the dates. I asked you if it was about that time.

A. I would not say whether it was or was not—there was a mortgage prior to that time, however.

There was a mortgage prior to that made *made* by the same people, and it was taken up when this new one was issued; that is, the original mortgage is included in this one, the first mortgage was taken in December.

Mr. BRUNER.—I now offer the mortgage itself in evidence. It is offered in evidence to show the purpose for which this mortgage was given, how it was given, and to show the authority Mr. Sheldon had with regard to the bank's affairs.

Paper referred to was thereupon received in evidence, marked Plaintiff's Exhibit "E," and was in words and figures as follows, to wit:

[Plaintiff's Exhibit "E"—Mortgage.]

"53543.

THIS MORTGAGE, made this 16th day of Feb-

ruary, 1911, between H. THORSEN, P. O. OLSEN, GUST LYNELL, DAN ANDERSON, ARVID AKESSON, GUS BJORNSTAD and GUS JOHNSON, all of Nome, Alaska, the mortgagors, and ALASKA BANKING & [60] SAFE DEPOSIT COMPANY, a corporation, doing business at Nome, Alaska, the mortgagee,

WITNESSETH:—That the said mortgagors hereby mortgage and make over to the said mortgagee all the following described personal property, now situate and being on the Lawrence Placer Mining Claim, in Cape Nome Precinct, District of Alaska, to wit: 2 16 h.p. boilers, 1 hoist, 12 cars, 1800 ft. rails, 50 points and 1500 ft. pipe; and also all the right, title and interest of the said mortgagors in and to the said mining claim, the same being a leasehold interest, and also all dumps of gold bearing earth or gravel now upon said mining claim or which shall hereafter be hoisted or placed thereon.

As security for the payment to the said mortgagee of the sum of six hundred dollars, with interest thereon, evidenced by two certain promissory notes in the words and figures following, to wit:

\$500.00

Nome, Alaska. 12/17/1910.

On or before 6/15/11 after date, without grace, for value received, We jointly & severally promise to pay to the ALASKA BANKING & SAFE DEPOSIT COMPANY, or Order, at the banking house of said bank in the City of Nome, Alaska, the sum of Five hundred and no/100 Dollars, with interest thereon at the rate of one per cent per month from date until paid, principal and interest payable only

in United States gold coin. And if suit shall be commenced for the recovery of any amount due upon this note, we agree to pay as attorney's fees thereon such additional sum as the Court may adjudge reasonable.

The maker and all endorsers hereof, and each and every party to this note, severally waive presentment [61] and demand for payment, protest and notice of protest, and notice of non payment of this note.
No. 5019.

Signed: H. THORSEN.

P. O. OLSEN.

By H. THORSON,

Atty. in Fact.

DAN ANDERSON.

ARVID AKESSON.

GUS BJORNSTAD.

GUS JOHNSON.

C. CHRISTIANSON.

H. LARSEN.

R. BURNETT.

By R. BURNETT,

Agt. in fact.

\$100.00

On demand, after date, without grace, for value received, We jointly & severally promise to pay to the ALASKA BANKING & SAFE DEPOSIT COMPANY, or order, the sum of One Hundred and no/100 Dollars, with interest thereon at the rate of one per cent per month from date until paid, principal and interest payable only in United States Gold Coin. And if suit shall be commenced for the

recovery of any amount due upon this note, We agree to pay as Attorney's fees thereon such additional sum as the Court may adjudge reasonable.

The maker and all endorsers hereof, and each and every party to this note, severally waive presentment and demand for payment, protest and notice of protest, and notice of non-payment of this note.

No. 5039.

Signed: GUS LYNELL.

H. THORSEN.

PETE OLSEN.

And also to secure the payment of such other and further sums of money as may be hereafter loaned or advanced by the mortgagee to the mortgagors, or any of them, during the continuance of **this mortgage**, not to exceed the sum [62] of two thousand dollars, exclusive of the sums mentioned in said promissory notes.

And the said mortgagors hereby covenant and agree with the said mortgagee that they are the sole owners of the property above mentioned and in the following proportions, namely, H. Thorsen 2/9, P. O. Olsen 2/9, Gust Lynell 2/9, Dan Anderson 1/12, Arvid Akesson 1/12, Gus Bjornstad 1/12, Gus Johnson 1/12, and that the same is free and unincumbered of or by any lien, mortgage, or pledge of any kind, except only a certain mortgage, dated December 17, 1910, executed and delivered to the said mortgagee; and said mortgagors further covenant and agree that they will work and mine the said mining claim steadily and continuously and in a careful and minerlike manner until the expiration of the term

of the lease aforesaid and that they will in all respects fully and faithfully comply with all the provisions of said lease; and they further covenant and agree that they will keep the said property and premises free and unincumbered of or by any liens or liens of laborers, miners, or materialmen, during the continuance of this mortgage; and that all gold and gold dust which shall be mined or extracted from the said premises, except royalty due the owner thereof, shall be at once paid and delivered to said mortgagee until the sum above mentioned shall be fully paid; and they do further agree that the agents and representatives of the mortgagee shall at all times have the right to enter upon and into all parts of said mining claim and to prospect and sample all earth and gravel in any and all dumps, shafts, drifts and stopes thereon or therein.

It is agreed and provided that the personal [63] property above mentioned shall remain in the possession of the mortgagors until default be made hereof, but that in case of default of any of the acts or things above agreed to be done or performed by the mortgagors, then the mortgagee may at once enter into the possession of the said property and of all drifts, shafts, stopes, and all parts of the *the* said mining claim, and may continue to work and mine the same and to wash and to sluice all dumps now thereon or which shall hereafter be mined, extracted or hoisted, and for such purposes the said mortgagors do hereby appoint the mortgagee their true and lawful attorney, with full power and authority to act in the premises; it is also agreed and

provided that in case of default in the payment of aforesaid principal sum or interest, or any part thereof, or of default in any of the matters above specified, then, at the election of the mortgagee, the United States Marshal, for the District of Alaska, Second Division, may sell the property aforesaid, or any part thereof, in the manner provided by law and from the proceeds of such sale pay the amounts due under this mortgage, including costs and attorney's fee, and return the overplus, if any, to the said mortgagors, and the said mortgagors do hereby authorize and empower the said Marshal to make such sale, in case of such default, or the mortgagee may otherwise foreclose this mortgage and sell the said property in any manner provided by law.

IN WITNESS WHEREOF, the said mortgagors have hereunto set their hands and seals the day and year first above written. [64]

H. THORSEN. (Seal)

GUS BJORNSTAD. (Seal)

ARVID AKESSON. (Seal)

DAN ANDERSON. (Seal)

GUS JOHNSON. (Seal)

PETER OLSEN. (Seal)

GUST LYNELL. (Seal)

Signed, sealed and delivered in the presence of:

Miss MARY ANDERSON.

F. E. FULLER.

District of Alaska,
Cape Nome Precinct,—ss.

THIS CERTIFIES, that on this 20th day of February, 1911, before me, the undersigned, a Notary

Public, in and for the District aforesaid, duly commissioned and qualified, personally came the within named H. Thorsen, P. O. Olsen, Gust Lynell, Dan Anderson, Arvid Akesson, Gus Bjornstad, and Gus Johnson, to me known and known to me to be the same persons named in and who executed the foregoing and within mortgage, and acknowledged to me that they executed the same freely and voluntarily.

Witness my hand and notarial seal the day and year first above written.

[Notarial Seal]

F. E. FULLER,
Notary Public for Alaska.

District of Alaska,
Cape Nome Precinct,—ss.

H. Thorsen, P. O. Olsen, Gust Lynell, Dan Anderson, Arvid Akesson, Gus Bjornstad, and Gus Johnson, the mortgagors within named, and J. V. Sheldon, acting cashier of the Alaska Banking & Safe Deposit Company, the within named mortgagee, and on behalf of said [64½] mortgagee, being first duly sworn, each for himself, deposes and says that the said mortgage is made in good faith to secure the amounts named therein and without any design to hinder, delay or defraud creditors.

H. THORSEN.
GUS BJORNSTAD.
ARVID AKESSON.
DAN ANDERSON.
GUS JOHNSON.
PET OLSEN.
GUST LYNELL.
J. V. SHELDON.

(Testimony of Joe V. Sheldon.)

Subscribed and sworn to before me this 20th day of February, 1911.

[Notarial Seal]

F. E. FULLER,
Notary Public for Alaska.

Filed at request of L. H. McCloy, Feb. 23, 1911, at 45 minutes past 3 o'clock, Records Cape Nome Recording District, Alaska.

GEO. D. SCHOFIELD,
Recorder.
By W. W. Sale,
Deputy."

Q. After the execution of this mortgage, all of the gold-dust that was taken from the mine was taken charge of by you, was it not?

Mr. ORTON.—Objected to as entirely immaterial. It does not in any way tend to show that he guaranteed or promised to pay the bills of another, and even if he did so guarantee it is illegal and comes within the statutes of frauds.

The COURT.—Objection that it is immaterial is sustained.

To which ruling of the Court the plaintiff duly excepted and an exception was allowed.

Q. Are you now in possession of the mine, and when I speak [65] of "you" I do not mean you personally, but is the bank in the possession of the Thorsen Company's mine?

Mr. ORTON.—That is objected to as immaterial.

The COURT.—Objection sustained.

To which ruling of the Court the plaintiff duly excepted and an exception was allowed.

(Testimony of Joe V. Sheldon.)

Q. Mr. Sheldon, did you have any agreement independent of this mortgage with Gust Lynell, Pete Olson and Mr. Thorsen, members of the Thorsen Mining Company, whereby they were not entitled to draw any money whatsoever from the bank?

A. Did I have an agreement with either of them?

Q. When I speak to you, I mean the bank, always.

A. No, sir, I did not.

Q. Did you communicate with the head officials of the bank outside as to your actions from time to time for the bank? A. I told them by letter.

Q. Did you write during the month of February as to what you had done with reference to the Thorsen Mining Company, did you make a report of that?

A. I think I told Mr. Thatcher. I told him I loaned some money to the Thorsen Mining Company.

Q. What did Mr. Thatcher say when you wrote and told him that?

A. He did not write to me about it.

Q. Did you, prior to the 16th day of February, did you employ Mr. Al Folsom to make an expert opinion—to give an expert opinion of the value of the mine? A. I did.

(Witness excused.) [66]

[Testimony of Chas. H. Milot, for Plaintiff.]

Mr. CHAS. H. MILOT, called by the plaintiff, being duly sworn, testified as follows:

Direct Examination.

(By Mr. BRUNER.)

I am bookkeeper for Mr. Rowe. I have been in his employ since the 1st day of March, 1911. I have

(Testimony of Chas. H. Milot.)

entire control of the books. I am familiar with his books from the month of January, to a certain extent, because I went through the books and opened up a new set of books on the first of March. I know the Thorsen Mining Company account; on February 1st, 1911, they owed Mr. Rowe \$384.34, which was transferred to the new ledger. When I went to work for Mr. Rowe on the 1st day of March I found an account of Thorsen Mining Company on the books of Mr. Rowe. There were no instructions given me of any character with regard to continuing the account in that name, or otherwise. Eliminating the old account of the Thorsen Mining Company of \$384.43, there is a balance due Mr. Rowe of \$1,640.00. I attended to the collections at the bank. I did the banking at the bank of the Alaska Banking & Safe Deposit Co.

Q. What did you do with the bills of the Thorsen Company?

A. Gave them to Mr. Sheldon in the Alaska Bank.

Q. Did you have any conversation with him in regard to the payment of them?

A. I did. This was along somewhere about the first of April and May. I was representing Mr. Rowe. I asked Mr. Sheldon when the bill was going to be paid, and he said he had said he had the check ready; there were two payments made to me at the bank, I believe, but there was no further conversation until June, when I went in and [661½] asked him for a check, for I think the April and May account, and he said there was no money, and I said, "Well,

(Testimony of Chas. H. Milot.)

you are going to pay it anyhow?" and he said, "No." I presented the bills at the bank and left them there and he said he would send them out and have them O.K.'d and that then they would be paid.

On cross-examination the witness testified as follows:

(By Mr. ORTON.)

The bills were made out on this account, and those that were paid were paid by the check of the Thorsen Mining Company, signed Thorsen Mining Company.

(Witness excused.)

[Testimony of E. W. Carlton, for Plaintiff.]

E. W. CARLTON, called by the plaintiff, being duly sworn testified:

Direct Examination.

(By Mr. BRUNER.)

I am in the hardware business in Nome. I know the Alaska Banking & Safe Deposit Company and Mr. Sheldon. I did a trading business with the Thorsen Mining Company during a portion of last winter, and then shut down credit upon them along in the spring, about February 1st, I believe.

Q. What did Mr. Sheldon say or do with reference to the Thorsen account?

A. He said he would pay the bills the first of each month.

Q. Did he give you any directions as to where the bills were to be brought, or what should be done with them? A. Yes.

Q. What was it? [67] A. At the bank.

(Testimony of E. W. Carlton.)

Q. What? A. Send the bills to the bank.

Q. To the Alaska Bank? A. Yes.

Sheldon made out the checks. I continued to carry the account in the name of Thorsen Mining Company. I am my own bookkeeper; the balance due me on my account from February 13, 1911, is \$373.04. I presented the bills to Mr. Sheldon at the bank.

On cross-examination the witness testified as follows:

(By Mr. ORTON.)

The first conversation I had with Mr. Sheldon with relation to furnishing any goods to the Thorsen Company was about the middle of February. I had several conversations with Mr. Sheldon, the exact dates of which I do not recall, in regard to the Thorsen account, and when I asked Mr. Sheldon about the bills, all he said was, he thought they would be paid. He said to "take the bills to him" I can't remember when the first conversation was; the first conversation I remember definitely with him was about May or June.

On redirect examination the witness testified as follows:

(By Mr. BRUNER.)

Q. State whether or not the conversation with Mr. Sheldon in regard to the affairs of Thorsen Company was the cause of your resumption of credit relations with them. [68] A. It was; yes, sir.

Q. Well, now, your account which you have intro-

(Testimony of E. W. Carlton.)

duced in evidence, beginning February 13th, can you state whether this conversation with Mr. Sheldon was before or after the 13th of February?

A. I can't state the exact date, but that was about the date—that is about the date of the time it was.

I presented some of the bills to Mr. Sheldon and received payment by check signed "Thorsen Mining Company, S."

(Witness excused.)

**[Testimony of Geo. L. Marshall, for Plaintiff
(Recalled).]**

GEO. L. MARSHALL, recalled by the plaintiff, testified as follows:

(By Mr. BRUNER.)

Q. Were you present at any conversations held by Mr. Sheldon with regard to the Thorsen Mining Company's account, and if so state the time, place, and parties present?

A. Between the 11th of February and the 16th of February, Mr. Stevenson and Mr. Sheldon came into the office.

Q. Between the 11th and 16th of February of this year? A. Of this year.

Q. Where?

A. In the Cold Storage Company's office.

Q. Who were present?

A. Mr. Taggart and myself were in the office.

Q. And who else?

A. Mr. Stevenson and Mr. Sheldon came over there.

(Testimony of Geo. L. Marshall.)

Q. Now, state what the subject of that conversation was, and what was said.

A. Why, Mr. Stevenson and Mr. Sheldon came in and Mr. Sheldon [69] spoke about reopening their account, and giving them further means to run their claims on; also, I was to take the bills to the bank the first of every month and he would pay them.

Q. Was that said in the presence of all the parties you have named there?

A. Yes, sir, Mr. Taggart, Mr. Sheldon, Mr. Stevenson and myself.

(Witness excused.)

[**Testimony of Wm. Morrison, for Plaintiff.**]

WM. MORRISON, called by plaintiff, being duly sworn, testified as follows:

Direct Examination.

(By Mr. BRUNER.)

I am a clerk in Mr. Carlton's hardware store. I know Mr. Joe Sheldon and had a conversation with him about the Thorsen Mining Company account about the middle of February. I had occasion to converse with him two or three different times. About the 2d or 3d of March I presented the first bill to Mr. Sheldon and he told me it would be paid inside of two or three days, that he would have to send the bill out to the Thorsen people and have it O. K.'d, and then it would be all right. When I presented the statement the following month Mr. Sheldon told me as to his paying the bill contracted in the month of February then, that he thought it would be possible to pay this back outstanding bill that the

Thorsen people owed Carlton Hardware Co., and asked me to make out an itemized bill of Carlton's account and present it to him.

IT WAS ADMITTED by the respective counsel that proper assignments of these accounts were made to [70] W. J. Rowe, the plaintiff in this action.

Plaintiff thereupon rested.

[Motion for Judgment of Nonsuit, etc.]

Mr. ORTON.—At this time the defendant moves the Court for a judgment of nonsuit be given against the plaintiff, upon the grounds that the plaintiff has failed to prove a case sufficient to be submitted to the jury, being the cause mentioned in the Third subdivision, Section 237 of the Code.

We make this motion with reference to the entire action, and also wish to submit the same motion, separately, as to each cause of action, without the necessity of repeating the words over—we make the motion separately.

The COURT.—We shall consider it as being made in each cause of action without restating the grounds.

Mr. ORTON.—We desire also to submit a motion as to each cause of action upon the ground also, that the evidence fails to show that any goods were sold and delivered to the defendant by the respective plaintiffs named, and that the evidence fails to show that Mr. Sheldon had any authority on behalf of the defendant, Alaska Banking & Safe Deposit Company, to make an agreement for the sale of any goods to be delivered to Thorsen Mining Company.

Further, I would like to make a motion upon the additional grounds that the alleged guarantee [71] given by Mr. Sheldon is oral, and the alleged contract alleged to have been given by him was oral, and therefore within the Statutes of Frauds.

(After argument.)

The COURT.—The motion for a nonsuit is sustained; there has not been a case made out sufficient to be submitted to the jury.

To which ruling of the Court the plaintiff then and there duly excepted and an exception was allowed by the Court.

The foregoing constitutes the testimony and statement of all the evidence introduced and offered upon the trial of this cause.

NOW, THEREFORE, in furtherance of justice and that right may be done, the plaintiff presents the foregoing as his Bill of Exceptions in this case, and prays that the same may be signed, settled and allowed, and certified by the judge as provided by law.

ELWOOD BRUNER,
Attorney for Plaintiff. [72]

[Order Approving Bill of Exceptions, etc.]

The foregoing BILL OF EXCEPTIONS is correct in all respects, and is hereby approved, settled and allowed, and certified as a part of the record in this case.

Done in open court at Nome, Alaska, this 24 day of Oct., 1912.

CORNELIUS D. MURANE,
U. S. District Judge.

Due service of the foregoing proposed Bill of Exceptions is hereby admitted this day of May, 1912.

.....,
Attorney for Defendant. [73]

[Endorsed]: No. 2303. In the District Court, District of Alaska, Second Div. W. J. Rowe, Plaintiff, vs. Alaska Banking & Safe Deposit Co., Defendant. Bill of Exceptions. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jun. 11, 1912. John Sundback, Clerk. By J. A. B., Deputy.

Refiled in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 24, 1912. John Sundback, Clerk. By J. A. B., Deputy. Elwood Bruner, Attorney for Plaintiff. [74]

*In the District Court for the District of Alaska,
Second Division.*

No. 2303.

WILLIAM J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT COMPANY, a Corporation,

Defendant.

Assignment of Errors.

COMES NOW the plaintiff in the above-entitled action, and assigns the following errors as having been committed on the trial and in the proceedings

in the above-entitled action, upon which he intends and does rely upon his writ of error to be prosecuted from the order granting a nonsuit and the judgment in said action, to the United States Circuit Court of Appeals for the Ninth Circuit:

1. The Court erred in sustaining the objection of the defendant to the question of the witness, Joe V. Sheldon, the proceedings being as follows to wit:

Mr. BRUNER.—You were the acting manager of the bank as well as acting cashier, were you not?

Mr. FULLER.—Object to any testimony that he was acting manager of the bank, because there is no such officer known to the banking business.

The COURT.—Objection sustained.

Objection allowed.

2. The Court erred in sustaining the objection of the defendant to the question of the witness, Joe V. Sheldon, the proceedings being as follows, to wit:

Mr. BRUNER.—Do you remember taking a mortgage on behalf of the bank on the property of the Thorsen Mining Company? [75]

Mr. ORTON.—That is objected to as irrelevant and immaterial, and would not tend in any way to show that the Alaska Banking & Safe Deposit Company purchased any goods of any of these parties plaintiff, or any of them.

Mr. BRUNER.—We may just as well have this question settled now, and I will state to counsel and the Court that I am asking this question for the purpose of showing the course we intend to pursue in this case. We are going to contend that the Alaska Bank through this particular act on the part of Mr.

Sheldon, in sending the Thorsen Mining Company out these goods with which to mine the ground; we want to show it as a consideration for which he made these promises to pay for these goods which he had made to these parties, to show the absolute interest of the bank for which he was acting cashier and in charge of its affairs.

Mr. ORTON.—That don't in any way tend to show it, that he sent out Mr. Folsom to expert any ground belonging to the Thorsen Mining Company.

The COURT.—The objection is sustained; we cannot anticipate evidence in this way.

Exception allowed.

3. The Court erred in sustaining the objection of the defendant to the question of the witness S. W. Taggart, the proceedings being as follows, to wit:

Mr. BRUNER.—Did Mr. Sheldon or any other person on behalf of the Alaska Banking & Safe Deposit Company, order any goods to be delivered by you to the Thorsen Mining Company?

A. They did.

Mr. ORTON.—Objected to as leading and also a calling for a conclusion of the witness as to whether any person was acting on behalf of the Alaska Banking & Safe Deposit Company; we make the further objection that the cashier of the Alaska [76] Banking & Safe Deposit Company had no implied authority to order goods to be delivered to the Thorsen Mining Company.

Mr. BRUNER.—I am getting at their relations with these plaintiffs in that regard.

Mr. ORTON.—We object to the question because

the cashier of a bank has well-defined authorities, and it is not one of the implied authorities of a cashier of a bank to buy or purchase butcher's supplies, or any other goods, wares or merchandise, for any third person upon the credit of the bank; that is not one of the ordinary powers of a cashier, in the ordinary business carried on by a bank.

Mr. BRUNER.—We expect to show that Mr. Sheldon acting on behalf of the Alaska Bank and representing the Alaska Bank, made these purchases.

Mr. FULLER.—We object to the statement of counsel in the presence of the jury.

The COURT.—The witness has answered the question.

Mr. ORTON.—I move to strike out the answer of the witness.

The COURT.—The motion is sustained.

Exception allowed.

4. The Court erred in sustaining the objection of the defendant to the question of the witness S. W. Taggart, the proceedings being as follows, to wit:

Mr. BRUNER.—State as near as you can what date it was in February when you made your arrangements with Mr. Sheldon.

Mr. ORTON.—That is objected to as the witness has not stated that he made any arrangements with Mr. Sheldon.

The COURT.—The question is immaterial so far, because it presumes something the witness has not stated. Objection sustained.

Exception allowed. [77]

5. The Court erred in sustaining the objection

of the defendant to the question of the witness, S. W. Taggart, the proceedings being as follows, to wit:

Mr. BRUNER.—State the circumstances, then, Mr. Taggart, with whom you consulted on behalf of the Alaska Bank.

Mr. ORTON.—That is objected to as assuming that he made any arrangements with the Alaska Bank.

The COURT.—Objection sustained.

Exception allowed.

6. The Court erred in sustaining the objection of the defendant to the question of the witness, S. W. Taggart, the proceedings being as follows, to wit:

Mr. BRUNER.—Did you sell any goods to the Alaska Bank or on the order of the Alaska Bank, Mr. Taggart, and upon the order of the bank deliver the same to Thorsen Mining Company?

Mr. ORTON.—I object to that because I don't understand in a case of this kind that he can testify to the case wholesale in this manner. If counsel are going to put in their case in this leading manner, without any direct testimony concerning the identity of the person or persons to whom he sold the goods, we certainly shall object to the same because it is calling for the conclusion of the witness. We think he should state the facts leading up to this transaction and let the jury determine whether or not any goods were sold to the bank. We object to it as being incompetent, irrelevant and immaterial and leading.

The COURT.—Objection sustained.

Exception allowed.

7. The Court erred in sustaining the objection of the defendant to the question of the witness, S. W. Taggart, the proceedings being as follows, to wit:

Mr. BRUNER.—Did you have any connection with the Alaska Banking and Safe Deposit Company in connection with the delivery [78] of any goods to the Thorsen Mining Company? A. I did.

Q. State what they were.

A. I delivered goods to the Thorsen Mining Company upon the order of Joe Sheldon, of the Alaska Bank.

Mr. ORTON.—That is objected to as a conclusion of the witness and move to strike out the statement of the witness. I think there should be some testimony as to what Mr. Sheldon said, and not give his conclusions. That is the very question for the Court and jury to determine from the evidence—upon what the order may have been based—what was said, and not allow the witness to testify to his conclusions, which is a mixed question of law and fact. I move to strike out the answer of the witness as his conclusion, without basing his answer upon what Mr. Sheldon said.

The COURT.—The conclusion will be stricken out. I think Mr. Taggart should simply state what their business relations were, what was said and done and what the transaction was, and show in what relation Mr. Sheldon stood with the bank in this transaction, which will be determined by what was said and done.

Exception allowed.

8. The Court erred in sustaining the objection of

the defendant to the question of the witness S. W. Taggart, the proceedings being as follows, to wit:

Mr. BRUNER.—Who paid for that mutton?

A. The bank did.

Q. The bank, through what person?

A. Well, the only one who had charge of the affairs.

Q. Well, who?

A. Mr. Sheldon did and authorized us to deliver to the Thorsen Mining Company whatever they wanted. [79]

Mr. FULLER.—We object to any statement of the witness that any party authorized him to do anything without giving the conversation and words upon which statement is made so that the Court and jury may judge whether there was any such authorization made.

The COURT.—Motion sustained. You will have to give the language Mr. Sheldon used in that regard.

Exception allowed.

9. The Court erred in sustaining the objection of the defendant to the question of the witness S. W. Taggart, the proceedings being as follows, to wit:

Mr. BRUNER —Who paid them?

A. The Alaska Bank.

Q. To you?

A. I never saw the checks, but they were paid by the bank and at the bank.

Mr. ORTON.—We move to strike out the answer, now it appears that he never saw the checks himself, by his own answer. We move to strike out all the testimony relating to the payment of the checks by

the bank, as it now appears that they were not paid to him, and that he never has seen the checks.

The WITNESS.—I will take that back. I did see the last check because this controversy came up before the last check was deposited and I saw it.

Mr. ORTON.—We move to strike out everything except relating to the last check as hearsay.

The COURT.—Motion granted.

Exception allowed.

10. The Court erred in refusing to receive Plaintiff's Identification "A" in evidence, and thereupon the following proceedings were had:

Mr. BRUNER.—I now offer Plaintiff's Identification "A" [80] in evidence.

Mr. ORTON.—To which we object on the ground that it is incompetent, irrelevant and immaterial, and not binding upon the bank.

The COURT.—Objection sustained.

Exception allowed.

11. The Court erred in sustaining the objection of the defendant to the question of the witness, W. J. Rowe, the proceedings being as follows, to wit:

Mr. BRUNER.—Did you ever demand your money from Mr. Sheldon? A. No, my bookkeeper did.

Mr. ORTON.—Move to strike out the answer, except the last part, except "No, sir," as it is not responsive.

The COURT.—Motion sustained.

Exception allowed.

12. The Court erred in sustaining the objection of the defendant to the question of the witness, W. J. Rowe, the proceedings being as follows, to wit:

Mr. BRUNER.—After you stopped the credit of the Thorsen Mining Company, did you ever at any time after that extend any credit to the Thorsen Company?

Mr. ORTON.—That is objected to as incompetent, irrelevant and immaterial, and not the proper way to prove accounts, and calls for a conclusion of the witness.

The COURT.—I think the witness may state the facts and allow the jury to draw their conclusions from the facts. This question calls simply for a conclusion of the witness.

A. No, sir, I did not.

Mr. ORTON.—Your Honor sustained the objection to the last question and I would ask that the answer of the witness be stricken out.

The COURT.—It may be stricken out. [81]

Exception allowed.

13. The Court erred in sustaining the objection of the defendant to the question of the witness, W. J. Rowe, the proceedings being as follows, to wit:

Mr. BRUNER.—Did you after that time in January that you have spoken of, did you extend any credit to the Thorsen Mining Company?

Mr. ORTON.—I understand your Honor has just this minute stricken that out. We object on the same grounds.

The COURT.—Objection sustained.

Exception allowed.

14. The Court erred in sustaining the objection of the defendant to the question of the witness, Joe V. Sheldon, the proceedings being as follows, to wit:

Mr. BRUNER.—After the execution of this mortgage, all the gold-dust that was taken from the mine was taken charge of by you, was it not?

Mr. ORTON.—Objected to as entirely immaterial; it does not in any way tend to show that he guaranteed or promised to pay the bills of another, and even if he did so guarantee it is illegal and comes within the statute of frauds.

The COURT.—The objection that it is immaterial sustained.

Exception allowed.

15. The Court erred in sustaining the objection of the defendant to the question of the witness, Joe V. Sheldon, the proceedings being as follows, to wit:

Mr. BRUNER.—Are you now in possession of the mine, and when I speak of “you,” I do not mean you personally, but is the bank in the possession of the Thorsen Company’s mine?

Mr. ORTON.—That is objected to as immaterial.

The COURT.—Objection sustained.

Exception allowed. [82]

16. The Court erred in sustaining defendant’s motion of nonsuit against the plaintiff, and thereupon the following proceedings were had:

Mr. ORTON.—At this time the defendant moves the Court for a judgment of nonsuit be given against the plaintiff upon the grounds that the plaintiff has failed to prove a case sufficient to be submitted to the jury, being the cause mentioned in the third subdivision, section 237, of the Code.

We make this motion with reference to the entire action, and also wish to submit the same motion,

separately, as to each cause of action, without the necessity of repeating the words over—we make the motion separately.

The COURT.—We shall consider it as being made in each cause of action without restating the grounds.

Mr. ORTON.—We desire also to submit a motion as to each cause of action upon the ground also, that the evidence fails to show that any goods were sold and delivered to the defendant by the respective plaintiffs named, and that the evidence fails to show that Mr. Sheldon had any authority on behalf of the defendant, Alaska Banking & Safe Deposit Company, to make an agreement for the sale of any goods to be delivered to Thorsen Mining Company.

Further, I would like to make a motion upon the additional grounds that the alleged guarantee given by Mr. Sheldon is oral, and the alleged contract alleged to have been given by him was oral, and therefore within the statute of frauds.

(After argument.)

The COURT.—The motion for a nonsuit is sustained; there has not been a case made out sufficient to be submitted to the jury.

To which ruling of the Court the plaintiff then and there duly excepted and an exception was allowed by the Court. [83]

WHEREFORE, plaintiff prays that the order granting nonsuit in said action and the judgment therein be reversed, and a new trial be granted therein.

Dated at Nome, Alaska, October 26, 1912.

ELWOOD BRUNER,
Attorney for Plaintiff.

Due service of the within Assignment of Errors is hereby accepted at Nome, Alaska, this 26th day of October, 1912, by receiving a copy thereof.

IRA D. ORTON,
Attorney for Defendant. [84]

[Endorsed]: No. 2303. Dist. Court, Dist. of Alaska, Second Division. William J. Rowe, Plff., vs. Alaska Banking & Safe Deposit Co., Dft. Assignment of Errors. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 26, 1912. John Sundback, Clerk. By J. A. B., Deputy. [85]

*In the District Court for the District of Alaska,
Second Division.*

W. J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT CO., a
Corporation,

Defendant.

Petition for Writ of Error.

W. J. Rowe, the plaintiff in the above-entitled action, feeling himself aggrieved by the decision of the Judge of the above-entitled court in granting a judgment of nonsuit in the above-entitled action on the 3d day of October, 1911, and the judgment made and entered thereon on October 14, 1911, comes now by Elwood Bruner, his attorney, and petitions said Court for an order allowing said plaintiff to prosecute a Writ of Error to the United States Court of

Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also, that an order be made fixing the amount of security which said plaintiff shall give and furnish upon said writ of error, and that upon the giving of said security all further proceedings in this court shall be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

ELWOOD BRUNER,

Attorney for Plaintiff.

Service of the foregoing petition admitted this 26th day of October, 1912.

IRA D. ORTON,

Attorney for Defendant. [86]

Order Allowing Writ of Error.

Now, on this 26th day of October, A. D. 1912, IT IS ORDERED that said Writ of Error be allowed as prayed for, the said plaintiff, W. J. Rowe, to give a bond in the sum of \$250.00/100, which shall operate as a supersedeas.

Done in open court at Nome, Alaska, this 26th day of October, 1912.

CORNELIUS D. MURANE,

Judge of the District Court, District of Alaska, Second Division.

[Endorsed]: No. 2303. In the District Court, District of Alaska, Second Div. W. J. Rowe, Plaintiff,

vs. Alaska Banking & Safe Deposit Co., Defendant.
Petition for Writ of Error & Order Allowing Writ
of Error. Filed in the office of the Clerk of the Dis-
trict Court of Alaska, Second Division, at Nome.
Oct. 26, 1912. John Sundback, Clerk. By J. A. B.,
Deputy. Elwood Bruner, Attorney for Plaintiff.
[87]

*In the District Court for the District of Alaska,
Second Division.*

W. J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT CO., a
Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, W. J. Rowe, as principal, and Thorulf
Lehmann and Frank J. Grimm as sureties, are held
and firmly bound unto the Alaska Banking & Safe
Deposit Co., a corporation, defendant in the above-
entitled action in the sum of Two Hundred and Fifty
(\$250.00) Dollars, for the payment of which well and
truly to be made we bind ourselves, our and each of
our heirs, executors, administrators and assigns,
firmly by these presents.

Sealed with our seals and dated this 26th day of
October, 1912.

WHEREAS, lately at a session of the United
States District Court for the District of Alaska, Sec-

ond Division, in an action pending in said court between W. J. Rowe, as plaintiff, and the Alaska Banking & Safe Deposit Co., a corporation, defendant, a judgment of nonsuit was on the 14th day of October, 1911, rendered and entered in favor of said defendant and against said plaintiff, and said plaintiff having obtained from said District Court an order allowing a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, to review said judgment, and a Citation to said Alaska Banking [88] & Safe Deposit Company, is about to be issued, citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California;

NOW, THEREFORE, the condition of the above obligation is such, that if the said W. J. Rowe, plaintiff, shall prosecute his said writ of error to effect, and answer all damages and costs if he fails to make his plea good, then this obligation shall be void; otherwise it shall be and remain in full force and effect.

W. J. ROWE, [Seal]

Principal.

THORULF LEHMANN, [Seal]

F. J. GRIMM, [Seal]

Sureties.

United States of America,

District of Alaska,—ss.

Thorulf Lehmann and Frank J. Grimm, being first duly sworn, each for himself, and not one for the other, deposes and says:

I am a resident of the District of Alaska, and a

surety on the within and foregoing undertaking; that I am not a counsellor or attorney at law, marshal, deputy marshal, commissioner, clerk of any court or other officer of any court; that I am worth the sum of \$250.00 over and above all debts and liabilities and exclusive of property exempt from execution.

THORULF LEHMANN.

F. J. GRIMM.

Subscribed and sworn to before me this 26th day of October, 1912.

[Notarial Seal]

L. W. HAYDEN,

Notary Public, District of Alaska. [89]

On this 26th day of October, 1912, the foregoing bond being presented in open court, is hereby approved.

CORNELIUS D. MURANE,

District Judge.

[Endorsed]: No. 2303. In the District Court, District of Alaska, Second Division. W. J. Rowe, Plaintiff, vs. Alaska Banking & Safe Deposit Co., Defendant. Bond on Writ of Error. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 26, 1912. John Sundback, Clerk. By J. A. B., Deputy. [90]

*In the District Court, District of Alaska, Second
Division.*

W. J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT COM-
PANY, a Corporation,

Defendant.

**Order Enlarging Time [to February 1, 1913, to File
Record Thereof and to Docket Cause in Circuit
Court of Appeals].**

Upon the application of Elwood Bruner, attorney for the plaintiff in error in the above-entitled cause, it appearing to the satisfaction of the Court that it will be impossible for the plaintiff in error to docket the transcript on writ of error with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, until the 1st day of February, 1913, which will be after the return day set in the writ of error granted herein, to wit, the 26th day of November, 1912;

IT IS ORDERED for the time of filing and docketing said writ of error and the transcript, records and proceedings therein, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of Seattle, State of Washington, be and is hereby enlarged to and including the 1st day of February, 1913.

Done in open court this 26th day of October, 1912.

CORNELIUS D. MURANE,

U. S. District Judge.

[Endorsed]: No. 2303. In the District Court, District of Alaska, Second Division. W. J. Rowe, Plaintiff, vs. Alaska Banking & Safe Deposit Co., Defendant. Order Enlarging Time. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 26, 1912. John Sundback, Clerk. By J. A. B., Deputy. [91]

In the District Court, District of Alaska, Second Division.

W. J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT COMPANY, a Corporation,

Defendant.

Stipulation [That Cause may be Heard at Seattle, Wash.].

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the respective parties in the above-entitled cause, that the said cause may be heard on appeal before the United States Circuit Court of Appeals at Seattle, Washington.

Dated at Nome, Alaska, October 26th, 1912.

ELWOOD BRUNER,
Attorney for Plaintiff.

IRA D. ORTON,
Attorney for Defendant.

[Endorsed]: No. 2303. In the District Court, District of Alaska, Second Div. W. J. Rowe, Plain-

tiff, vs. Alaska Banking & Safe Deposit Company. Stipulation. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 26, 1912. John Sundback, Clerk. By J. A. B., Deputy. [92]

*In the District Court for the District of Alaska,
Second Division.*

W. J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT COM-
PANY, a Corporation,

Defendant.

**Order [Directing That Cause be Set for Hearing at
Seattle, Wash.].**

IT APPEARING TO THE COURT, that the attorneys for the respective parties in the above-entitled cause have stipulated that the said cause be heard on appeal before the United States Circuit Court of Appeals, at Seattle, Washington, and good cause appearing therefor, upon motion of Elwood Bruner, it is hereby ordered that the said cause be set for hearing before the said Circuit Court of Appeals at Seattle, Washington.

Dated at Nome, Alaska, October 26th, 1912.

CORNELIUS D. MURANE,

U. S. District Judge.

[Endorsed]: No. 2303. In the District Court, District of Alaska, Second Div. W. J. Rowe, Plaintiff, vs. Alaska Banking & Safe Deposit Company,

Alaska Banking and Safe Deposit Company. 97
Defendant. Order. Filed in the office of the Clerk
of the District Court of Alaska, Second Division, at
Nome. Oct. 26, 1912. John Sundback, Clerk. By
J. A. B., Deputy. [93]

UNITED STATES OF AMERICA.

District Court, District of Alaska, Second Division.

Cause No. 2303.

W. J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT CO.,
a Corporation,

Defendant.

Praeipce [for Transcript on Writ of Error].

To the Clerk of the Above-entitled Court:

You will please prepare transcript on Writ of
Error in above-entitled cause of Complaint, Answer,
and Reply, Order Directing Verdict, Judgment, Bill
of Exceptions, Minutes of Court and papers on Writ
of Error.

ELWOOD BRUNER,
Attorney for Plaintiff.

[Endorsed]: Cause No. 2303. District Court,
District of Alaska, ——— Division. W. J. Rowe,
Plaintiff, vs. Alaska Banking & Safe Deposit Co., a
Corporation, Defendant. Praeipce. Filed in the
office of the Clerk of the District Court of Alaska,
Second Division, at Nome. Oct. 24, 1912. John
Sundback, Clerk. By ———, Deputy. [94]

[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]

*In the District Court for the District of Alaska,
Second Division.*

No. 2303.

W. J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT COM-
PANY, a Corporation,

Defendant.

I, John Sundback, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 94, both inclusive, are a true and exact transcript of the Complaint, Answer, Reply, Court Minutes of October 3, 1911 (Judgment for nonsuit), Judgment, Bill of Exceptions, Assignment of Errors, Petition for Writ of Error, Order Allowing Writ of Error, Bond on Writ of Error, Order Enlarging Time, Stipulation for Hearing at Seattle, Washington, Order for Hearing at Seattle, Washington, and Praecipe for Transcript on Writ of Error, in the case of W. J. Rowe, Plaintiff, vs. Alaska Banking & Safe Deposit Company, a Corporation, Defendant, No. 2303—Civil, this Court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; and further certify that the original Writ of Error and original Citation in the above-entitled cause are attached to this transcript.

Cost of transcript \$40.25, paid by Elwood Bruner, attorney for plaintiff.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 29th day of October, A. D. 1912.

[Seal]

J. SUNDBACK,

Clerk. [95]

Writ of Error.

The President of the United States of America, to the Honorable CORNELIUS D. MURANE, Judge of the United States District Court for the District of Alaska, Second Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between W. J. Rowe, plaintiff in error, and Alaska Banking & Safe Deposit Co., a corporation, defendant in error, a manifest error hath happened to the great damage of the said W. J. Rowe, plaintiff in error, as by his complaint appears;

We, being willing, that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in that behalf, do command you, if judgment be given therein, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Justices of the United States Circuit Court of Appeals, in the City of San Francisco, State of California, together with this writ, so

as to have the same at said place and said circuit on the 25th day of November, 1912, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct these errors, what of right and according to the laws and customs of the United States should be done. [96]

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 26th day of October, 1912.

Attest my hand and the Seal of the United States District Court for the District of Alaska, Second Division, at the Clerk's Office, in Nome, Alaska, this 26th day of October, 1912.

[Seal]

J. SUNDBACK,

Clerk of the United States District Court for the District of Alaska, Second Division.

Allowed this 26th day of October, 1912.

CORNELIUS D. MURANE,

Judge of the United States District Court for the District of Alaska, Second Division.

Service of the foregoing Writ of Error is hereby admitted this 26th day of October, 1912

IRA D. ORTON,

Attorney for Defendant. [97]

[Endorsed]: No. 2303. In the District Court, District of Alaska, Second Division. W. J. Rowe, Plaintiff in Error, vs. Alaska Banking & Safe Deposit Co., Defendant in Error. Writ of Error.

Filed in the Office of the Clerk of the District Court
of Alaska, Second Division at Nome. Oct. 26, 1912.
John Sundback, Clerk. By J. A. B., Deputy. [98]

*In the United States District Court for the District
of Alaska, Second Division.*

W. J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT CO.,
a Corporation,

Defendant.

Citation.

United States of America,—ss.

The President of the United States, to Alaska Bank-
ing & Safe Deposit Co., a Corporation, Defend-
ant Above Named, and to Ira D. Orton, Its At-
torney, Greeting:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Appeals
for the Ninth Circuit, to be holden at the city of
San Francisco, in the State of California, within
thirty days from the date of this writ, to wit, on the
25th day of November, 1912, pursuant to a writ of
error filed in the Clerk's office of the District Court
for the District of Alaska, Second Division, wherein
W. J. Rowe is plaintiff in error, and you, said Alaska
Banking & Safe Deposit Co., a corporation, are de-
fendant in error, to show cause, if any there be, why
the judgment in said writ of error mentioned should

not be corrected, and speedy justice done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 26th day of October, 1912, and of the Independence of [99] the United States the one hundred and thirty-seventh.

CORNELIUS D. MURANE,

Judge of the United States District Court for the District of Alaska, Second Division.

[Seal]

Attest: J. SUNDBACK,

Clerk of the United States District Court, District of Alaska, Second Div.

Personal service of the foregoing citation made on me and receipt of a copy thereof admitted this 26th day of October, 1912.

IRA D. ORTON,

Attorney for Defendant. [100]

[Endorsed]: No. 2303. In the District Court, District of Alaska, Second Division. W. J. Rowe, Plaintiff, vs. Alaska Banking & Safe Deposit Co., Defendant. Citation. Filed in the Office of the Clerk of the District Court of Alaska, Second Division at at Nome. Oct. 26, 1912. John Sundback, Clerk. By J. A. B., Deputy. [101]

[Endorsed]: No. 2239. United States Circuit Court of Appeals for the Ninth Circuit. W. J. Rowe, Plaintiff in Error, vs. Alaska Banking & Safe Deposit Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Second Division.

Received November 11, 1912.

F. D. MONCKTON,
Clerk.

Filed January 9, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals,
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

